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In the
SUPREME COURT OF THE UNITED STATES

JEREMIAH W. (JAY) NIXON, *et al.*,
Petitioners,

v.

MISSOURI REPUBLICAN PARTY, *et al.*,
Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JAMES R. LAYTON
State Solicitor
Counsel of Record

PAUL R. MAGUFFEE
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

QUESTION PRESENTED

Whether a political party has a First Amendment right to make unlimited contributions to candidates notwithstanding the limits on contributions by party committees imposed by Rev. Stat. Mo. § 130.032.4 and on contributions by all other committees imposed by Rev. Stat. Mo. § 130.032.2.

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are Jeremiah W. (Jay) Nixon, in his official capacity as Attorney General of Missouri; Charles G. Lamb, in his official capacity as Executive Director of the Missouri Ethics Commission; Mike Greenwell, in his official Capacity as Chair of the Missouri Ethics Commission; and the other Members of the Missouri Ethics Commission, in their official capacities: James Spain; Sandra Donahue; Philip Conger; Donald Gann; and Elaine Spielbusch. Current Commission members Spain, Donahue, and Conger have been substituted for Patricia Flood, Robert Gardner, and Richard Adams, who were members of the Commission at the time the suit was filed.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Missouri, on his own behalf and on behalf of the members and the Executive Director of the Missouri Ethics Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A-1) is reported at 227 F.3d 1070. The decision of the court of appeals denying a motion to stay (App. A-17) is not reported. The opinion of the district court (App. A-19) is reported at 100 F. Supp. 2d 990.

The decision of the court of appeals entering an injunction pending appeal (App. A-44) is not reported. The decision of the court of appeals denying rehearing and rehearing en banc of the injunction pending appeal (App. A-48) is not reported.

The earlier decision of the district court entering a preliminary injunction (App. A-49) is reported at 31 F. Supp. 2d 1161. The decision of the district court denying petitioners' motion to vacate the preliminary injunction (App. A-58) is reported at 87 F. Supp. 2d 912. The court of appeals' order holding in abeyance petitioners' appeal from that denial (App. A-76) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2000. Circuit Justice Thomas entered an order extending the time in which to file a petition for writ of certiorari until January 9, 2001. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Mo. Rev. Stat. § 130.011 (2000) provides, in pertinent part:

> As used in this chapter, unless the context clearly indicates otherwise, the following terms mean: . . .
>
> (3) "Candidate", an individual who seeks nomination or election to public office. The term "candidate" includes . . . an individual who seeks nomination by the individual's political party for election to public office . . . A candidate shall be deemed to seek nomination or election when the person first:
>
> > (a) Receives contributions or makes expenditures or reserves space or facilities with intent to promote the person's candidacy for office; or
> >
> > (b) Knows or has reason to know that contributions are being received or expenditures are being made or space or facilities are being reserved with the intent to promote the person's candidacy for office . . . .
> >
> > (c) Announces or files a declaration of candidacy for office;
> >
> > . . .
>
> (7) "Committee", a person or any combination of

persons, who accepts contributions or makes expenditures for the primary or incidental purpose of influencing or attempting to influence the action of voters for or against the nomination or election to public office of one or more candidates or the qualification, passage or defeat of any ballot measure or for the purpose of paying a previously incurred campaign debt or obligation of a candidate or the debts or obligations of a committee or for the purpose of contributing funds to another committee: . . .

> (b) The term "committee" includes, but is not limited to, each of the following committees: campaign committee, candidate committee, continuing committee and political party committee;
>
> . . .

(10) "Continuing committee", a committee of continuing existence which is not formed, controlled or directed by a candidate, and is a committee other than a candidate committee or campaign committee, whose primary or incidental purpose is to receive contributions or make expenditures to influence or attempt to influence the action of voters whether or not a particular candidate or candidates or a particular ballot measure or measures to be supported or opposed has been determined at the time the committee is required to file any statement or report pursuant to the provisions of this chapter. "Continuing committee" includes, but is not limited to, any committee organized or sponsored by a business entity, a labor organization, a professional association, a trade or business association, a club or other organization and whose primary purpose is to

solicit, accept and use contributions from the members, employees or stockholders of such entity and any individual or group of individuals who accept and use contributions to influence or attempt to influence the action of voters. . . .

(12) "Contribution", a payment, gift, loan, advance, deposit, or donation of money or anything of value for the purpose of supporting or opposing the nomination or election of any candidate for public office or the qualification, passage or defeat of any ballot measure, or for the support of any committee supporting or opposing candidates or ballot measures or for paying debts or obligations of any candidate or committee previously incurred for the above purposes. A contribution of anything of value shall be deemed to have a money value equivalent to the fair market value. "Contribution" includes, but is not limited to:

(a) A candidate's own money or property used in support of the person's candidacy other than expense of the candidate's food, lodging, travel, and payment of any fee necessary to the filing for public office;

(b) Payment by any person, other than a candidate or committee, to compensate another person for services rendered to that candidate or committee;

(c) Receipts from the sale of goods and services, including the sale of advertising space in a brochure, booklet, program or pamphlet of a candidate or committee and the sale of tickets or political merchandise;

(d) Receipts from fund-raising events including testimonial affairs;

(e) Any loan, guarantee of a loan, cancellation or forgiveness of a loan or debt or other obligation by a third party, or payment of a loan or debt or other obligation by a third party if the loan or debt or other obligation was contracted, used, or intended, in whole or in part, for use in an election campaign or used or intended for the payment of such debts or obligations of a candidate or committee previously incurred, or which was made or received by a committee;

(f) Funds received by a committee which are transferred to such committee from another committee or other source, except funds received by a candidate committee as a transfer of funds from another candidate committee controlled by the same candidate but such transfer shall be included in the disclosure reports;

(g) Facilities, office space or equipment supplied by any person to a candidate or committee without charge or at reduced charges, except gratuitous space for meeting purposes which is made available regularly to the public, including other candidates or committees, on an equal basis for similar purposes on the same conditions;

(h) The direct or indirect payment by any person, other than a connected organization, of the costs of establishing, administering, or

maintaining a committee, including legal, accounting and computer services, fund raising and solicitation of contributions for a committee;

(i) "Contribution" does not include:

a. Ordinary home hospitality or services provided without compensation by individuals volunteering their time in support of or in opposition to a candidate, committee or ballot measure, nor the necessary and ordinary personal expenses of such volunteers incidental to the performance of voluntary activities, so long as no compensation is directly or indirectly asked or given; . . .

(15) "Election", any primary, general or special election held to nominate or elect an individual to public office, to retain or recall an elected officeholder or to submit a ballot measure to the voters, and any caucus or other meeting of a political party or a political party committee at which that party's candidate or candidates for public office are officially selected. A primary election and the succeeding general election shall be considered separate elections;

(16) "Expenditure", a payment, advance, conveyance, deposit, donation or contribution of money or anything of value for the purpose of supporting or opposing the nomination or election of any candidate for public office or the qualification or passage of any ballot measure or for the support of any committee which in turn supports or opposes any candidate or ballot

measure or for the purpose of paying a previously incurred campaign debt or obligation of a candidate or the debts or obligations of a committee; a payment, or an agreement or promise to pay, money or anything of value, including a candidate's own money or property, for the purchase of goods, services, property, facilities or anything of value for the purpose of supporting or opposing the nomination or election of any candidate for public office or the qualification or passage of any ballot measure or for the support of any committee which in turn supports or opposes any candidate or ballot measure or for the purpose of paying a previously incurred campaign debt or obligation of a candidate or the debts or obligations of a committee. An expenditure of anything of value shall be deemed to have a money value equivalent to the fair market value. "Expenditure" includes, but is not limited to:

(a) Payment by anyone other than a committee for services of another person rendered to such committee;

(b) The purchase of tickets, goods, services or political merchandise in connection with any testimonial affair or fund-raising event of or for candidates or committees, or the purchase of advertising in a brochure, booklet, program or pamphlet of a candidate or committee;

(c) The transfer of funds by one committee to another committee;

(d) The direct or indirect payment by any person, other than a connected organization for a committee, of the costs of establishing,

administering or maintaining a committee, including legal, accounting and computer services, fund raising and solicitation of contributions for a committee; but

(e) "Expenditure" does not include: . . .

b. The internal dissemination by any membership organization, proprietorship, labor organization, corporation, association or other entity of information advocating the election or defeat of a candidate or candidates or the passage or defeat of a ballot measure or measures to its directors, officers, members, employees or security holders, provided that the cost incurred is reported pursuant to subsection 2 of section 130.051;

. . .

d. The rendering of voluntary personal services by an individual of the sort commonly performed by volunteer campaign workers and the payment by such individual of the individual's necessary and ordinary personal expenses incidental to such volunteer activity, provided no compensation is, directly or indirectly, asked or given; . . .

(19) "In-kind contribution" or "in-kind expenditure", a contribution or expenditure in a form other than money;

. . .

(24) "Political party", a political party which has the right under law to have the names of its candidates listed on the ballot in a general election;

(25) "Political party committee", a state, district, county, city, or area committee of a political party, as defined in [Mo. Rev. Stat.] section 115.603, which may be organized as a not for profit corporation under Missouri law, and which committee is of continuing existence, and has the primary or incidental purpose of receiving contributions and making expenditures to influence or attempt to influence the action of voters on behalf of the political party;

(26) "Public office" or "office", any state, judicial, county, municipal, school or other district, ward, township, or other political subdivision office or any political party office which is filled by a vote of registered voters;

Mo. Rev. Stat. § 130.032 (2000) provides, in pertinent part:

1. . . . [T]he amount of contributions made by or accepted from any person other than the candidate in any one election shall not exceed the following:

(1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, one thousand dollars;

(2) To elect an individual to the office of state senator, five hundred dollars;

(3) To elect an individual to the office of state representative, two hundred fifty dollars;

(4) To elect an individual to any other office, including judicial office, if the population of the electoral district, ward, or other unit according to the latest decennial census is under one hundred thousand, two hundred fifty dollars;

(5) To elect an individual to any other office, including judicial office, if the population of the electoral district, ward, or other unit according to the latest decennial census is at least one hundred thousand but less than two hundred fifty thousand, five hundred dollars; and

(6) To elect an individual to any other office, including judicial office, if the population of the electoral district, ward, or other unit according to the latest decennial census is at least two hundred fifty thousand, one thousand dollars.

2. For purposes of this subsection "base year amount" shall be the contribution limits prescribed in this section on January 1, 1995. Such limits shall be increased on the first day of January in each even-numbered year by multiplying the base year amount by the cumulative consumer price index, as defined in [Mo. Rev. Stat.] section 104.010 and rounded to the nearest twenty-five-dollar amount, for all years since January 1, 1995.

3. Candidate committees, exploratory committees, campaign committees and continuing committees, other than those continuing committees which are political

party committees, shall be subject to the limits prescribed in subsection 1 of this section. The provisions of this subsection shall not limit the amount of contributions which may be accumulated by a candidate committee and used for expenditures to further the nomination or election of the candidate who controls such candidate committee, except as provided in section 130.052.

4. Except as limited by this subsection, the amount of cash contributions, and a separate amount for the amount of in-kind contributions, made by or accepted from a political party committee in any one election shall not exceed the following:

(1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, ten thousand dollars;

(2) To elect an individual to the office of state senator, five thousand dollars;

(3) To elect an individual to the office of state representative, two thousand five hundred dollars; and

(4) To elect an individual to any other office of an electoral district, ward or unit, ten times the allowable contribution limit for the office sought.

The amount of contributions which may be made by or accepted from a political party committee in the primary election to elect any

candidate who is unopposed in such primary shall be fifty percent of the amount of the allowable contributions as determined in this subsection.

. . .

7. Any committee which accepts or gives contributions other than those allowed shall be subject to a surcharge of one thousand dollars plus an amount equal to the contribution per nonallowable contribution, to be paid to the ethics commission and which shall be transferred to the director of revenue, upon notification of such nonallowable contribution by the ethics commission, and after the candidate has had ten business days after receipt of notice to return the contribution to the contributor. The candidate and the candidate committee treasurer or deputy treasurer owing a surcharge shall be personally liable for the payment of the surcharge or may pay such surcharge only from campaign funds existing on the date of the receipt of notice. Such surcharge shall constitute a debt to the state enforceable under, but not limited to, the provisions of chapter 143, [Rev. Stat. Mo.]

STATEMENT OF THE CASE

In *Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897 (2000), this Court upheld Missouri's limits on contributions to candidates for public office. Those limits ranged from $250 to $1000 (since adjusted for inflation) per election, depending on the size of the constituency. Missouri's statute, however, set much higher limits for contributions made by the type of committee involved here: a political party committee. Those limits originally ranged from $2500 to $10,000 per election (ten times the amount allowed for other committees) and applied separately to monetary and "in-kind" contributions (which are covered by the single limit for other committees). The Eighth Circuit struck those limits, leaving political party committees – unique among all committees – able to channel literally unlimited funds to candidates.

1. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court explained the background for the adoption of the limits on contributions to candidates found in the Federal Election Campaign Act (FECA). *See* 424 U.S. at 13-24. Those included a prohibition on making or accepting contributions over $5,000 per election from political committees. 2 U.S.C. § 441a(a)(2). "Contribution" was broadly defined; it included "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." *Id.* § 431(8)(A)(i). And the FECA included political party committees among the "committees" whose "contributions" were limited. *Id.* § 431(4). Absent any special provision, then, political party committees would be subject to precisely the same limits on "contributions" – whether monetary or in-kind, whether direct or indirect – as other political committees.

The FECA did not give party committees relief from the

$5,000 limit for monetary contributions to candidates for most federal offices, but it did make a few exceptions to that general rule. It placed a higher, $17,500 limit on contributions by party committees to candidates for the U.S. Senate. *Id.* § 441a(h). And it permitted additional expenditures by party committees in support of individual candidates, even expenditures made in coordination with the candidate, in amounts ranging from $67,560 to $1,636,438. *Id.* § 441a(d).[1] For those expenditures, however, the statute aggregates the spending by national, state, and subordinate state party committees. *Id.*

Just as Missouri followed the FECA example in setting the individual and committee contribution limits upheld in *Shrink Missouri*, the State set higher limits for political party committee contributions. As to monetary contributions, Missouri set the limit on party contributions at ten times the amount set for other committees. Mo. Rev. Stat. § 130.032.4.[2]

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[1] This aspect of campaign financing for federal elections, which is at issue in *Federal Election Comm'n v. Colorado Republican Federal Campaign Committee*, No. 00-191, is explained in more detail in the Federal Election Commission's "Campaign Guide for Political Party Committees" (1996) at 16-17, copy available at http://www.fec.gov/pdf/partygui.pdf. The FEC publishes the inflation-adjusted limits on such expenditures annually; the current limits are found in the March 2000 edition of the Federal Election Commission's newsletter, "Record," at 14-15, available at http://www.fec.gov/pdf/mar00.pdf.

[2] Because the inflation adjustment set out in Mo. Rev. Stat. § 130.032.2 includes a rounding requirement, the exact amount of the limit may vary from the initial figure of 10 times the individual and nonparty committee contribution limit. Thus the limits for state offices today are $11,175, $5,600, and $2,800, depending on the constituency of office sought by the

Adjusted for inflation, as of October 1998 the limits were $10,750 for candidates for statewide office, $5,375 for candidates for state senate, and $2,700 for candidates for the state House of Representatives. The limits applied separately to monetary and "in-kind" contributions. They applied separately to each election (primary and general). Thus the party could provide as much as $43,000 in direct support to individual candidates.[3]

2. This case began in 1998 when, for the first time since Missouri imposed contribution limits, a party committee exceeded those amounts. In the waning days of that fall's campaigns, the Missouri Republican Party made large monetary contributions to four candidates: $133,500 to Chuck Pierce, running for State Auditor; $68,750 to Eric Zahnd and $10,550 to Sarah Steelman, both running for State Senate; and $8,300 to Mike Reid, running for State Representative.[4] The candidates reported those contributions to the Missouri Ethics Commission pursuant to Mo. Rev. Stat. § 130.041. Upon review, the

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candidate being supported. They are halved, however, for contributions made prior to a primary election when the candidate being supported is running unopposed for the party's nomination. The limits will remain at their current level until January 1, 2002. *See* Mo. Rev. Stat. § 130.032.2 (2000).

[3] Thus they are unlike the federal "coordinated expenditures" limits, which permit such financial support only during the general election campaign. *See* 2 U.S.C. § 441a(3).

[4] At that time, enforcement of Missouri's other contribution limits was enjoined pursuant to the Eighth Circuit decision subsequently reversed in *Shrink Missouri*. The party limits were not challenged in *Shrink Missouri*, and thus their enforcement was not subject to the injunction in that case.

Commission's staff noted that the contributions exceeded the amounts permitted by § 130.032.4. The Commission immediately notified the candidates of the excess contributions, triggering the enforcement provision of § 130.032.7. One of the candidates responded by returning the excess amount; the remaining candidates, their campaign committees, their campaign treasurers, and the Party responded by bringing this suit, challenging the constitutionality of limits on party contributions.

The district court entered a preliminary injunction, based in part on the recognition by the parties and the court that limits on political party contributions made little sense so long as there were no limits on contributions by anyone else. That situation changed, however, when this Court ruled in *Shrink Missouri*. Once the injunctions in that case were lifted and the State's ability to enforce limits on individual and committee contributions was restored, the party limits became critical. Petitioners immediately moved to vacate the preliminary injunction, citing this Court's decision in *Shrink Missouri* and, later, the court of appeals' decision on remand. The district court denied that motion and set a July 2000 hearing on the permanent injunction. App. A-74-76. Petitioners immediately appealed pursuant to 28 U.S.C. § 1292(a)(1) (1994) and moved to expedite the appeal. The Eighth Circuit instead ordered that the appeal be held in abeyance. App. A-76.

While preparing for the permanent injunction hearing, petitioners filed a motion for summary judgment. The district court granted that motion and cancelled the hearing. App. A-19. The court left in place its preliminary injunction until it could hear a motion for injunction pending appeal. It then entered such an injunction – but only as to enforcement against contributions already made.

At respondents' request, the Eighth Circuit entered a broader injunction pending appeal from the Eighth Circuit. App. A-44. The court *en banc* declined to stay that injunction. App. A-48.

3. After accelerated briefing and argument, the Eighth Circuit, in a divided opinion, reversed the district court and ordered the entry of a permanent injunction. The court held that Missouri could not limit the size of monetary contributions made by political party committees to candidates for public office. App. A-8.

The court began where this Court's decisions in *Shrink Missouri* and other cases require: with an analysis of *Buckley v. Valeo*. App. A-4. But the court quickly found this case to be distinguishable from *Buckley*. According to the court of appeals, the considerations that led to the affirmance of contribution limits in *Buckley* (and later in *Shrink Missouri*) "simply do not carry the same force when the contributor is a political party." App. A-4. That conclusion led the court of appeals to depart from the *Buckley* and *Shrink Missouri* holdings upholding contribution limits as a tool for attacking the reality or the perception of corruption that is "inherent in a regime of large individual financial contributions." 424 U.S. at 27.

The Eighth Circuit's legal conclusion was the result of its factual determination that party speech is unique. According to that court, only political parties speak "principal[ly] . . . through the speech of their candidates." App. A-4-5. When looking for the possibility that a party could corrupt a candidate, the court treated parties and candidates as "virtual alter egos." App. A-5. The court relied heavily on another divided opinion, that of the Tenth Circuit in *Federal Election Commission v. Colorado Republican Federal Campaign*

Committee, 213 F.3d 1221 (10th Cir. 2000), *cert. granted*, No. 00-191 (set for argument Feb. 28, 2001) (*Colorado Republican II*). *See* A-6-8. The Eighth Circuit cited the Tenth in deciding that "the first amendment rights at stake" when party financial support for candidates is involved "are different from, and weightier than" those considered in *Buckley*. App. A-5-6.

Judge John Gibson dissented, pointing out that the reasons presented by the State for imposing limits on party contributions were "neither novel nor implausible." App. A-15. Judge Gibson would have followed the holding in *Shrink Missouri* and upheld the limit. App. A-16.

Faced with the prospect of continuing the 2000 elections without any limits on how much money could flow through the parties to candidates, petitioners again asked the court *en banc* to stay that order and to vacate the injunction pending appeal. The court denied that request. App. A-76. This Court denied petitioners' request for a stay pending the filing of this petition.

REASONS FOR GRANTING THE PETITION

In *Nixon v. Shrink Missouri Government PAC*, this Court addressed the constitutionality of Missouri's limits on contributions to candidates by individuals and by committees other than political party committees. In *Colorado Republican II*, No. 00-191, this Court is being asked to address the constitutionality of limits on expenditures by political party committees that are in support of and coordinated with candidates. This case bridges the gap between *Shrink Missouri* and *Colorado Republican II*: it addresses the constitutionality of limits on contributions by political party committees to candidates.

This Court presumably granted the petition for writ of

certiorari in *Colorado Republican II* because the court of appeals' ruling striking down federal limits on "coordinated expenditures" "sets aside the balance struck by Congress on a matter peculiarly within the legislative competence, and it threatens substantial disruption of the statutory scheme." Petition of the Federal Election Commission in *Colorado Republican II*, No. 00-191, at 11. The Eighth Circuit's holding presents the same threat, and merits consideration for the same reasons.

But this case also presents a conflict among the courts. The decision of the Eighth Circuit conflicts with a decision of the Supreme Court of Alaska, as to which this Court denied a petition for writ of certiorari. And it conflicts with holdings by the U.S. District Courts in Colorado and Vermont. That conflict leaves states, candidates, and political parties confused as to the constitutionality of limits on political party contributions imposed by the federal government and by dozens of states.

A. The holding of the Eighth Circuit on its face only eliminates Missouri's ability to restrict the flow of large sums to candidates through party committees. But it would presumably also lead to the striking of Minnesota's limits. Minn. Stat. Ann. § 10A.27.1 - .2 (West Supp. 2000). It would effectively preclude the imposition of limits in Arkansas, Iowa, Nebraska, and North and South Dakota. Its impact on campaign finance there and elsewhere is evident from Missouri's experience. Throughout the 1990s, the most that all political party committees in Missouri combined (and there are scores of such committees) gave to all candidates combined was $820,721 in 1997-98. But in the 1999-2000 cycle, just the Republican and Democratic State Committees contributed a total of $4,128,275 to candidates. That change was a direct result of the elimination of party limits from Missouri's

statutory scheme.

The impact of the court of appeals decision will not be limited, however, to state elections. The holding will be binding when someone challenges the FECA limits on party contributions in an effort to open the door to increased contributions to candidates for federal office. There is nothing in the history or language of the FECA to distinguish that law or to otherwise suggest that those limits could survive the Eighth Circuit's test. Though the limits the FECA imposes do not mirror those adopted in Missouri, they are in some respects lower, and thus even more susceptible to challenge. Once the Eighth Circuit's rule is applied to federal elections, candidates for the U.S. Senate, House of Representatives, and even the Presidency are likely to see the same kind of infusion of "party" funds that Missouri saw because of the injunctions in this case. And though the direct infusion may be limited to the seven Eighth Circuit states, money will be traded among party and other committees nationwide to broadly spread the impact of the Eighth Circuit's unique rule.

B. Unlike *Colorado Republican II*, this case presents a direct conflict among the courts. Three courts that have addressed the issue of limits on party contributions have reached conclusions contrary to that of the Eighth Circuit.

The first conflicting decision was *State of Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 625-26 (Alaska 1999), *cert. denied* 120 S.Ct. 184 (2000). The Alaska Supreme Court upheld Alaska's limits on contributions by political party committees, which "range from $100,000 [per year] to candidates for governor or lieutenant governor to $5,000 [per year] to candidates for certain other offices." 978 P.2d at 625, citing Alaska Stat. § 15.13.070(d) (Lexis 1998). The court noted testimony that "pass-throughs" of money contributed to

a party but intended for a candidate make "'a mockery of contribution limits and turn[ ] political parties into money launderers.'" 978 P.2d at 626. The court distinguished *Colorado Republican Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (*Colorado Republican I*), as "address[ing] limits on parties' independent expenditures, not contributions" (978 P.2d at 626), and noted the presence of party limits in the FECA (*id.*). The court concluded that "[a]bsent any limits on contributions by parties, . . . there would be substantial potential for undue influence, *i.e.*, *quid pro quo* corruption or the appearance of corruption." *Id.*

The decision of the first federal court to rule on the question, *Citizens for Responsible Government v. Buckley*, 60 F.Supp.2d 1066, 1095 (D. Colo. 1999), was recently vacated, though its rationale was not questioned on appeal. *Citizens for Responsible Government v. Davidson*, 2000 U.S. App. LEXIS 33727 (10th Cir. Dec. 26, 2000). The district court had affirmed Colorado's use of limits ranging from $10,000 to $40,000 on contributions by party committees. Like the Alaska Supreme Court, the Colorado court found a "genuine potential for corrupting undue influence on a candidate's campaign" and that "quid pro quo corruption or the appearance of corruption" can arise from party contributions. 60 F. Supp. 2d at 1094. In the wake of the Colorado court's treatment of other parts of the Colorado statute, the Colorado legislature repealed the limits and eliminated the basis for appeal. But the decisions leave the door open to a new set of party limits.

Most recently, the U.S. District Court for the District of Vermont permitted the use of limits on party contributions, relying on the decision of the district court in this case. *Citizens for Responsible Government. Landell v. Sorrell*, 118 F. Supp. 2d 459, 486-87 (D. Vt. 2000). The court expressly adopted the Colorado court's conclusions concerning the corrupting

potential of party contributions. *Id.* at 486. The court ultimately struck down Vermont's limits, which ranged from $200 to $400 (Vt. Stat. Ann. tit. 17, § 2805 (Supp. 1999)), as too low – "[m]ore stringent, even, than the small scale of Vermont politics would justify." *Id.* at 487. The court thus left the door open for limits at a more appropriate level – much as the Eighth Circuit's decision in *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996), striking down a lower set of limits in Missouri, left the door open for the limits upheld in *Shrink Missouri*.[5]

The Eighth Circuit's decision here, by contrast, slams and locks that door – but only in the Eighth Circuit. The door is open, permitting the regulation of party contributions, in Alaska. It is open for new regulations in Colorado and Vermont. But absent action by this Court, we will not know whether it is open in the many other states that have party limits[6] until those limits are challenged – by a purported

---

[5] A challenge to Maine's limits on party contributions was dismissed because the plaintiff Libertarian Party could not meet the "case or controversy" requirement merely by saying it wanted to someday exceed them. *Daggett v. Webster*, 81 F. Supp. 2d 128, 137 (D. Me. 2000), *affirmed on other grounds sub nom. Daggett v. Commission on Govtl. Ethics & Elect. Pract.*, 205 F.3d 445 (1st Cir. 2000).

[6] ARIZ. REV. STAT. ANN., § 16-905.D (1996); DEL. CODE ANN. tit. 15, § 8010(b) (1999); FLA. STAT. ANN. ch. 106.08(2) (Supp. 2000); GA. CODE ANN. §§ 21-5-43.1 (1999); KAN. STAT. ANN. § 25-4153(d), (g) (1993); MD. CODE ANN. ELEC. § 13-212(a)(1)-(2) (1999); MICH. COMP. LAWS ANN. § 69.252(3)-(4) (West Supp. 1999); MINN. STAT. ANN. § 10A.27.1 - .2 (West Supp. 2000); MONT. CODE ANN. § 13-37-216(3) (1999); TENN. CODE ANN. § 2-10-302, 2-10-306 (Supp.

contributor, party, or candidate using the Eighth Circuit's holding as ammunition, likely taking aim at a critical moment in a campaign. And absent action by this Court, we may never know whether the door is open in the remaining states, for the uncertainty the conflict among the courts creates may well deter state legislators from acting.

And it will deter, preempt, or at least complicate Congressional action. Again, though the Eighth Circuit's decision does not address the FECA's party limits, its holding will be binding in a challenge to any effort to enforce those limits within the Circuit's boundaries. And once that holding is applied to the FECA, Congress will be unable to effectively restrict the ability of parties to make unlimited contributions to many federal candidates – at least where the contributor and recipient can invoke the jurisdiction of a district court in the Eighth Circuit.

C. The inconsistency and uncertainty that the Eighth Circuit decision creates will likely be affected, but perhaps not alleviated, by a decision by this Court in *Colorado Republican II*.

A decision reversing the Tenth Circuit and upholding limits on coordinated expenditures would remove the precedential support the Eighth Circuit's holding claims. The appropriate course then would be to grant this petition, and either directly correct the Eighth Circuit, or vacate its decision and remand for further consideration in light of this Court's new precedent.

But a decision affirming the Tenth Circuit and striking

1999); WASH. REV. CODE ANN. § 42.17.640(1), (3) (West Supp. 2000).

down limits on coordinated expenditures would leave limits on party contributions as the only restriction on parties' financial support for candidates. The question whether the door is open for such limits would then be even more important, the conflict among the courts would become even more problematic, and the need for review by this Court would be even more apparent.

CONCLUSION

For the reasons stated above, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor
Counsel of Record

PAUL R. MAGUFFEE
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

Counsel for Petitioners

January 9, 2001

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 00-1773/2686

Missouri Republican Party, A Political Party Committee; Pierce for Auditor, A Candidate Committee; Charles A. Pierce; Marc Ellinger; Citizens for Eric Zahnd, A Candidate Committee; Eric Zahnd; Lee R. Keith; Citizens to Elect Mike Reid, A Candidate Committee; Michael J. Reid; and Elaine Tschee Reid,

Appellees/Cross-Appellants,

v.

Charles G. Lamb, In His Official Capacity as Executive Director of the Missouri Ethics Commission; Robert Gardner, In His Official Capacity as Chair of the Missouri Ethics Commission; Patricia Flood, In Her Official Capacity as Vice-Chair of the Missouri Ethics Commission; Richard Adams, Elaine Spielbusch, Donald Gann, and Mike Greenwell, In Their Official Capacity as Members of the Missouri Ethics Commission; and Jeremiah W. (Jay) Nixon, In His Official Capacity as Missouri Attorney General,

Appellants/Cross-Appellees.

Appeals from the United States District Court
for the Eastern District of Missouri

Submitted: August 9, 2000
Filed: September 11, 2000

Before BOWMAN, JOHN R. GIBSON, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge

This is a suit to enjoin the enforcement of Mo. Rev. Stat. § 130.032.4 and § 130.032.7, which limit the amount of cash and in-kind contributions that political parties may give to a candidate for public office, and provide penalties for violating the limitations that the statutes set. The plaintiffs (a political party, candidate committees, and candidates for public office) asserted that the statutes at issue violated their rights of free speech under the first amendment. The district court refused to issue an injunction and this appeal ensued. We reverse and remand with directions to the district court to enter an injunction that is not inconsistent with this opinion.

I.

The complaint in this case set out a series of cash contributions that the Missouri Republican Party made to the other plaintiffs in this case, described the actions that the defendants (the members of the Missouri Ethics Commission and the Missouri attorney general) intended to take against the plaintiffs because the contributions exceeded those that Missouri law allows, and asked for an injunction against the enforcement of the statutes under which the defendants

intended to proceed.

The plaintiffs argued to the district court that the monetary expenditures at issue here were not really contributions, as that term is regularly used in cases of this kind, but rather were coordinated expenditures made in conjunction and cooperation with the candidates and their committees. The district court rejected that construction of the facts, and held that there was no genuine factual dispute about the nature of the monetary expenditures involved, because the candidates retained control over how the money was to be spent. We agree with the district court.

We recognize that there will be cases in which the line between a contribution and a coordinated expenditure will be hard to draw, and we concede that that line may frequently be particularly difficult to discern when the case involves money that passes from a party to one of its candidates. That is partly because, for reasons that will presently appear, we believe that it is often difficult to distinguish a party from its candidates at all. But here, as the district court noted, the candidates admitted that, although they discussed the use of the money with the party before it passed to them, they were nevertheless free to spend it as they saw fit. It is this freedom on the part of the candidates that provides them with the kind of independence that requires us to characterize the money that passed to them as contributions as a matter of law.

This characterization, as the parties recognize, is important to the case because, although the Supreme Court has not decided the precise issue before us, it has decided that contributions by individuals are subject to limitation, despite the first amendment interests at stake, *see Buckley v. Valeo*, 424 U.S. 1, 20-23 (1976) (*per curiam*), while independent

expenditures by political parties are not, *see Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 608 (1996). Although these cases do not directly rule this one, since it falls somewhere between them, we nevertheless think that they provide guidance on the proper resolution of the questions raised. We believe that the recent case of *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), however, on which the defendants heavily rely, is of limited value in this respect, because, as we explain later, the fact that one of the plaintiffs in this case is a political party serves to distinguish it from *Shrink Missouri Government PAC* in a crucial way.

II.

The most important case for present purposes is *Buckley*, 424 U.S. at 20-21, which held that a limitation on individuals' contributions to candidates for public office was constitutional because such a limitation imposed "only a marginal restriction upon the contributor's ability to engage in free communication." That was because, as the Supreme Court saw it, a "contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support," *id.* at 21. A limitation on contributions, the Court therefore concluded, "involves little direct restraint on . . . political communication, for it permits the symbolic expression . . . evidenced by a contribution," *id.*

We think that these considerations simply do not carry the same force when the contributor is a political party. The main object of a political party is to elect its candidates to office, and, in large measure, the speech of its candidates is its own speech. While political parties employ various methods to speak, a principal way in which they express

themselves is through the speech of their candidates. In fact, parties and their candidates are often virtual alter egos.

We are not suggesting that there is always an exact one-to-one correspondence between candidates and their parties. Candidates and parties have their observable differences, and there is truth in the old adage that a platform is something to stand on, not to run on: Candidates are not mere agents or mouthpieces. But parties seek to field a team and support it. Candidates are frequently, moreover, and with excellent reason, called their party's standard-bearers, and they make frequent appeal to party principle; and in their interactions, candidates and parties influence each other and become more alike, so as to present a coordinated and common front. They are often, in other words, virtually indistinguishable from each other, and their identities are merged in a way that makes dealings between them more than merely transient symbiotic ones between separate and distinct entities.

Because of their unity of purpose, and the virtual identity of parties and their candidates, it is not easy to say, in the words of *Buckley*, 424 U.S. at 21, that a political party's contribution "does not communicate the underlying basis for the support." To the contrary, a party's contribution provides an ideological endorsement and carries a philosophical imprimatur that an individual's contribution does not, and thus it cannot properly be called a "contribution" in the same sense that the individual contributions at stake in *Buckley* were. Nor is a party's contribution to its candidate, again in the words of *Buckley*, *id.*, merely a "symbolic expression" of support; it is more like a substantive political statement than others' contributions are. As we see it, all of this indicates that the first amendment rights at stake here are different from, and weightier than, those that were involved in

Buckley. Cf. Federal Election Commission v. Colorado Republican Federal Campaign Committee, 213 F.3d 1221, 1227-28 (10th Cir. 2000).

III.

The nature and character of political parties are relevant to another important aspect of our consideration of this case, namely, the kind of reason that the government must advance in order to justify an intrusion on first amendment rights. In *Shrink Missouri Government PAC*, 120 S. Ct. at 905-06, the Supreme Court held that preventing the corruption of candidates served as a sufficiently compelling reason to limit the size of contributions from individuals and political action committees. But, as Mr. Justice Thomas has observed, it is not easy to see how a party could "corrupt" one of its own candidates, since, on account of their general unity of purpose, they are committed, in the main, to the same aims and principles. *See Colorado Republican Federal Campaign Committee*, 518 U.S. at 646 (opinion of Thomas, J.). As we see it, the threat that a political party will corrupt a candidate is not a very realistic one.

The defendants suggest alternatively that preventing the circumvention of the limits on individual contributions can serve to justify regulating the size of party contributions. *See Buckley*, 424 U.S. at 38; *see also id.* at 35-36. *Buckley*, however, upheld a limitation on the total amount that any one person could contribute on the ground that it would keep individuals from circumventing the limits on giving to any one candidate. *See id* . at 38. But here the challenged restriction is on the party's giving, and the defendants seek to justify it on the ground that it would keep individuals from doing an end run around limits on their own giving. This scheme burdens the free speech rights of political parties in

order to control the activities of someone else. This is something quite different from what *Buckley* approved.

Besides, the defendants admitted in their brief in this case that it would be illegal under Missouri law for an individual and a political party secretly to agree that the party would pass along the individual's contribution to a candidate after that individual had already contributed the statutory maximum. Such a contribution, the defendants say, would be treated under Missouri law as a contribution by the individual, not the party. The defendants therefore already have a mechanism in place that deals with attempts by individuals to circumvent limits on their contributions by using a political party as a mere conduit. *Cf.* 2 U.S.C. § 441a(a)(8). Limitations on party spending might have an indirect attenuating effect on secret "earmarking" agreements between individuals and political parties because such agreements may be hard to detect and police directly, but we think that that is too frail a rationale to justify burdening the substantial free speech rights of political parties that we have identified as being in jeopardy in this case. *Cf. Colorado Republican Federal Campaign Committee,* 213 F.3d at 1231-32.

The Supreme Court recently observed that, in deciding cases of this kind, it is important to keep in mind that the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised," *Shrink Missouri Government PAC,* 120 S. Ct. at 906. In this case, the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented. Since, for the reasons

indicated, we think that the justifications advanced for the statutory limitations relevant here are, in the context, novel and not particularly plausible, we hold that the challenged Missouri limitations on cash contributions are unconstitutional.

IV.

The district court refused to allow the plaintiffs to file an amended complaint because it believed that the proposed amendment raised issues with respect to in-kind contributions that the original complaint did not raise. It is true that the amended complaint adverted to the likelihood that most, if not all, in-kind contributions would actually be coordinated expenditures rather than contributions in the purest sense; and it is also true, as the district court noted, that the original complaint emphasized the impending enforcement efforts by the defendants with respect only to cash contributions. But the original complaint did challenge Missouri's statutory limits on in-kind contributions from parties, and the summary judgment materials contained evidence relating to those kinds of contributions. We therefore think that the case papers fairly raise the matter of in-kind contributions. Given our view of the case, namely, that the limitations on cash contributions are unconstitutional on their face, and given the fact that the defendants have advanced no basis on which, for constitutional purposes, the two kinds of contributions can be distinguished in the present factual context, we hold that Missouri's limits on in-kind contributions also offend the first amendment.

V.

We therefore reverse the judgment of the district court and remand the case for the entry of an injunction that is not inconsistent with this opinion.

JOHN R. GIBSON, Circuit Judge, concurring and dissenting.

I concur in the court's opinion to the extent that it holds that the payments by the party to the candidates were contributions and not expenditures. The candidates' freedom to spend the money as they saw fit requires that the money passed to them be characterized as contributions as a matter of law.

I agree that the Supreme Court's decisions in *Buckley v. Valeo*, 424 U.S.1 (1976) (per curiam), and *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996), provide guidance. I differ, however, with the court's conclusion that political party contributions are distinguishable from the situation presented in *Buckley* and with the court's assertion that the recent decision in *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), is of limited value here.

Buckley developed the groundwork for analyzing the constitutionality of campaign finance laws, distinguishing between contributions and expenditures and concluding that contribution limits impose less severe restrictions on First Amendment rights than expenditure limits. *See* 424 U.S. at 19-23. In *Shrink Missouri*, the Court recognized this distinction in upholding Missouri's limits on contributions made by any person. *See* 120 S. Ct. at 903-04. Significantly, five justices joined Justice Souter's opinion for the Court. True, *Shrink Missouri* does not speak directly to issues involving political party contributions. It does, however, demonstrate the continuing vitality of *Buckley*, and it sets out the standard we must apply here.

The court today asserts that, because of the special

nature of political parties, limits on their contributions are more burdensome than limits on contributions by individuals. The court supports its determination that the First Amendment rights of political parties "are different from, and weightier than, those that were involved in *Buckley*" with the novel conclusion that political parties and their candidates share a "virtual identity." While the court asserts that parties and candidates have "observable differences" and that there is not always an exact correspondence between them, it goes on to describe the party/candidate relationship in a variety of ways: a party and its candidate are "virtually indistinguishable from each other" and are "virtual alter egos" whose "identities are merged in a way that makes dealings between them more than merely transient symbiotic ones between separate and distinct entities." The court tergiversates as it reaches for a description of this relationship. Upon this shifting foundation, the court constructs its entire opinion.

There is no apparent consensus on the Supreme Court about the relationship between political parties and candidates. The *Colorado Republican* plurality (Justices Breyer, O'Connor, and Souter) rejected the argument that "a party and its candidate are identical, i.e., the party, in a sense, 'is' its candidates," pointing out that Congress treats parties and candidates differently by regulating contributions from one to the other. 518 U.S. at 622-23. Concurring and dissenting, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, observed that there is "a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity," along with "a practical identity of interests" between the two during an election. *Id.* at 630. Justice Thomas, also concurring and dissenting and also joined by Chief Justice Rehnquist and Justice Scalia, argued that a political party

could not corrupt its candidate because the party's "very aim . . . is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes." *Id.* at 646. Justice Stevens, joined by Justice Ginsburg, stated in dissent:

> A party shares a unique relationship with the candidate it sponsors because their political fates are inextricably linked. That interdependency creates a special danger that the party--or the persons who control the party--will abuse the influence it has over the candidate by virtue of its power to spend.

Id. at 648. The various expressions articulated by the court today come closest to Justice Kennedy's observations, but his conclusion that a party and its candidates engage in joint activity and share interests falls short of the court's conclusion that they are virtually identical, virtual alter egos, or in some way merged.

Regardless of the nature of the relationship, party contributions to candidates can be regulated. Although *Buckley* upheld limits on contributions by individuals and political committees, not political parties, its analysis was framed in a way that leads to the conclusion that it applies to all contributions, no matter what their source. *Buckley* addressed the constitutionality of various restrictions on political contributions and expenditures contained in the Federal Election Campaign Act, an "intricate statutory scheme adopted by Congress . . . that applies broadly to all phases of and all participants in the election process." 424 U.S. at 12-13 (emphasis added). The Court discussed contribution and expenditure limits in a section of its opinion entitled "General Principles," *id.* at 14, preceding any discussion of the specific provisions at issue in the case. This

placement indicates that the Court intended to set forth universally applicable precepts. Also telling is the fact that the Court discussed expenditure limits on political parties immediately before contrasting expenditure limits with contribution limits:

> The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending "relative to a clearly identified candidate," 18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV), would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication. Although the Act's limitations on expenditures by campaign organizations and political parties provide substantially greater room for discussion and debate, they would have required restrictions in the scope of a number of past congressional and Presidential campaigns and would operate to constrain campaigning by candidates who raise sums in excess of the spending ceiling.
>
> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication.

Id. at 19-21 (footnotes omitted). The order of the Court's

argument suggests that its discussion of contribution limits is fully applicable to limits on political parties.

Colorado Republican provides further support for the conclusion that *Buckley's* analysis applies here. The plurality held that the First Amendment prohibited applying the Federal Election Campaign Act's limit on political party expenditures to "an expenditure that the political party has made independently, without coordination with any candidate." *Colorado Republican*, 518 U.S. at 608. The opinion stressed the constitutional difference between contributions and expenditures that originated in *Buckley*. *See id.* at 614-15. The plurality's emphasis on the "constitutionally significant fact" that the party acted independently, *id.* at 617, demonstrates an assumption that limits on coordinated expenditures by political parties, which are treated as contributions under the Act, would be more likely to withstand constitutional scrutiny. *Cf. California Democratic Party v. Jones*, 120 S. Ct. 2402, 2415 (2000) (Kennedy, J., concurring) (five members of the Supreme Court "subscribe to the position that Congress or a State may limit the amount a political party spends in direct collaboration with its preferred candidate for elected office.").

It is thus evident that the constitutional distinction between contributions and expenditures applies to political party money. The free speech rights of parties are not greater than the free speech rights of individuals and political committees. Speech, after all, is speech, whether expressed by one or by a group formed to convey a common viewpoint. Limits on party contributions are subject to the same level of scrutiny as limits on individual and political committee contributions.

The contribution limits at issue should be upheld if

they are closely drawn to meet a sufficiently important interest. *See Shrink Mo.*, 120 S. Ct. at 904. The court relies on what it perceives to be the lack of a sufficiently important interest to hold that the limits are unconstitutional. The court doubts that a political party can corrupt its own candidate, but Missouri does not justify its limits on that ground. Instead, it explains that the limits deter evasion of individual contribution limits. [1]

A plurality of the Supreme Court upheld limits on contributions to multicandidate political committees because the limits furthered the interest of preventing actual or apparent corruption by limiting "circumvention of the very limitations on contributions that this Court upheld in *Buckley*." *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 197-98 (1981). Writing separately, Justice Blackmun also concluded "that contributions to multicandidate political committees may be limited . . . as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in *Buckley*." *Id.* at 203. *See also Buckley*, 424 U.S. at 38 (upholding a $25,000 overall limit on total contributions made by an individual because it acted to prevent evasion of the $1000 limit on contributions to a particular candidate that the Court held constitutional).

---

[1] Missouri also briefly argues that the party limits address the public's perception of corruption that occurs when large contributions are made to political parties, political parties make large contributions to candidates, and the candidates' decisions mirror the large contributors' positions. This is a variation on the evasion argument. That is, an appearance of corruption may arise if individuals can evade contribution limits by using a political party as a conduit.

Missouri's justification for the party contribution limits is neither novel nor implausible: in both *Buckley* and *California Medical*, the Supreme Court accepted preventing evasion of a constitutional limit as a sufficiently important governmental interest. The court's insistence on evidence to support this justification runs counter to these decisions and to the *Shrink Missouri* decision, which held that Missouri's individual limits are justified by its important interest in preventing corruption and the appearance of corruption. *See* 120 S. Ct. at 905-08. If there is sufficient evidence to support individual contribution limits enacted to prevent corruption or the appearance of corruption, it logically follows that there is sufficient evidence to support a contribution limit enacted to prevent evasion of the individual limits.

The court relies on its conclusion that political parties have different and more important free speech rights than individuals to discount Missouri's interest in deterring evasion of its individual contribution limits. Because contributions made by a political party are no different than contributions made by individuals or other groups, this reliance is unfounded.

The remaining issue is whether the limits are closely drawn to meet the government's interest. Under *Shrink Missouri*, a contribution limit will stand unless it is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id.* at 909. There is no evidence in the record to support a conclusion that Missouri's limits on political party contributions have created such "a system of suppressed political advocacy." *Id.* Because Missouri's limits on cash contributions that a party may make to a candidate are closely drawn to meet a sufficiently important governmental interest, they do not

violate the First Amendment.

I would affirm the district court's judgment.[2]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[2] The court holds that the limits on in-kind contributions offend the First Amendment, an issue not passed upon by the district court. Under my analysis, the in-kind limits are constitutionally valid.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-1773/2686EMSL

MISSOURI REPUBLICAN PARTY, et al.,
Appellants,

v.

CHARLES G. LAMB, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

The motion for stay filed by the appellees in this matter is denied.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent.

I would stay this court's decision and order remanding the case for entry of an injunction, pending appellees' petition for writ of certiorari, until further order of the United States Supreme Court. This would allow the Missouri law to be enforced pending final action by the Supreme Court.

I have articulated my reasons for this position in my dissenting opinion to the court's decision of September 11, 2000.

The motion to expedite consideration of the motion is denied as moot.

September 13, 2000.
Order Entered at the Direction of the Court.
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:98CV1909 CDP

MISSOURI REPUBLICAN PARTY, et al.,
Plaintiffs,

v.

CHARLES G. LAMB, et al.,
Defendants.

June 22, 2000

MEMORANDUM OPINION

Missouri law limits the amount of money political parties can give to candidates for public office. The Missouri Republican Party and the individual plaintiffs argue that these statutory limits violate their First Amendment rights to freedom of speech and association. I believe that under the Supreme Court precedent of *Nixon v. Shrink Missouri Gov't PAC* the limits are constitutional, and I will therefore grant the state's motion for summary judgment.

I. Background Facts

The particular provision of Missouri's campaign finance reform law at issue in this case is found at Missouri Revised Statute § 130.032.4. That section limits the amount of cash and in-kind contributions that a political party committee can make to a candidate in any one election:

> Except as limited by this subsection, the amount of cash contributions, and a separate amount for the amount of in-kind contributions, made by or accepted from a political party committee in any one election shall not exceed the following:
>
> (1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor, or attorney general, ten thousand dollars;
>
> (2) To elect an individual to the office of state senator, five thousand dollars;
>
> (3) To elect an individual to the office of state representative, two thousand five hundred dollars; and
>
> (4) To elect an individual to any other office of an electoral district, ward or unit, ten times the allowable contribution limit for the office sought.

Missouri Revised Statute § 130.032.2 requires that the limits contained in § 130.032.4 be adjusted for inflation in each even-numbered year by a calculation employing the cumulative consumer price index. In early 1998, the Ethics

Commission increased the limits listed in § 130.032.4(1)-(3) to $10,750, $5,250, and $2,750, respectively.

A committee that accepts party contributions in excess of the statutory limits is subject to a significant penalty, unless it promptly returns the contribution to the contributor after being so instructed by the Ethics Commission. *See* Mo. Rev. Stat. § 130.032.7. The per-contribution penalty is one thousand dollars plus an amount equal to the contribution. The candidate and the candidate committee treasurer or deputy treasurer are personally liable for payment of that penalty. Alternatively, they may pay the penalty from campaign funds existing on the date that the committee was notified of the violation by the Ethics Commission. *Id.*

Plaintiff Missouri Republican Party is a political party committee as defined by Mo. Rev. Stat. § 130.011(25). The individual plaintiffs are political candidates and candidate committees as defined by Mo. Rev. Stat. § 130.011(9) and officers of such candidate committees. Defendants are the executive director and members of the Missouri Ethics Commission and the Missouri Attorney General.

In the 1998 general election, the Missouri Republican Party made monetary contributions to several of the candidate committee plaintiffs. Those contributions exceeded the statutory limits. As a result, the Ethics Commission notified those plaintiffs that they were in violation of § 130.032.4's limits, and demanded that they return the Missouri Republican Party's contributions that exceeded the limits. After being advised that plaintiffs would file suit to enjoin enforcement of § 130.032.4, the Attorney General's office advised plaintiffs' counsel that the Ethics Commission would not seek to enforce the statute against

plaintiffs pending a hearing on their request for a preliminary injunction. Plaintiffs then filed this action.

II. Procedural History

On January 13, 1999, I enjoined enforcement of § 130.032.4. *Missouri Republican Party v. Lamb*, 31 F. Supp. 2d 1161 (E.D. Mo. 1999). At the parties' joint request, I later stayed all further proceedings pending the United States Supreme Court's decision in *Nixon v. Shrink Missouri Gov't PAC, cert. granted,* 119 S. Ct. 901 (1999).

On January 24, 2000, the Supreme Court decided *Nixon*, and upheld Missouri's limits on campaign contributions made by individuals and entities other than political parties. *Nixon v. Shrink Missouri Gov't PAC,* 120 S. Ct. 897 (2000). Based on that opinion, defendants asked me to vacate the injunction in this case. On March 13, 2000, I denied the motion to vacate the preliminary injunction. I set the case for expedited treatment and trial on July 5, 2000.

Defendants moved for summary judgment, contending that the contribution limits at issue here, which are approximately ten times higher than those found constitutional in *Nixon*, do not violate the First Amendment as a matter of law. In opposition, plaintiffs claim that factual disputes regarding the nature of the party's financial support of its candidates preclude summary judgment.

After careful consideration of *Nixon* and the parties' summary judgment submissions, I find that there are no factual issues remaining for trial: *Nixon* governs this case and requires me to uphold Missouri's campaign contribution limits on political parties as a matter of law.

III. Discussion

A. Standards Governing Summary Judgment

In determining whether summary judgment should issue, I have viewed the facts and inferences from the facts in the light most favorable to the nonmoving parties, here the plaintiffs. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, (1986). Under the governing standard, the defendants have the burden to establish both the absence of a genuine issue of material fact and that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Applying this standard, I find no genuine disputes of material fact that would preclude summary judgment. Instead, the issues I must decide are purely legal: 1) whether the Republican Party's financial support of its candidates should be characterized as contributions or expenditures;[1] and 2) if they are contributions, whether the limits survive as a matter of law under the standards set forth in *Nixon*.

B. Leave to Amend

Before turning to the merits, I must decide whether to permit plaintiffs to amend their complaint to challenge

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[1] I disagree with plaintiffs' contention that I must first decide whether justifications for limits on individual contributions also apply to political parties before I can classify the financial support as either contributions or expenditures. Instead, the financial support must be characterized first and the state's rationale for regulating the support comes into play only after I decide that the money is, in fact, contributions.

Missouri's limits on coordinated expenditures, which may be regulated as "in-kind" contributions under § 130.032.4.[2] The original complaint only challenged the cash contributions, but the proposed amendment alleges that the statute prohibits "coordination." This is a significant substantive change in the legal challenge to the statute, it has no factual tie to the enforcement action plaintiffs are threatened with here, and adding it would surely delay resolution of this case. I will deny leave to amend.

While leave to amend shall be freely given when justice so requires, Fed. R. Civ. P. 15(a), the Court may exercise its discretion and deny leave "when late tendered amendments involve new theories of recovery and impose additional discovery requirements" resulting in undue prejudice to the opposing party. *Bell v. Allstate Life Ins. Co.*, 160 F.3d 452, 454 (8th Cir. 1998).

Plaintiffs present their proposed amendments regarding coordinated expenditures nearly two years after this case was filed. Although the proceedings in this matter were stayed pending the Supreme Court's decision in *Nixon* pursuant to an agreement between the parties, the case upon which plaintiffs principally rely to support their new "expenditures" argument, *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S.

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[2] Plaintiffs also propose amendments concerning: 1) inflation adjustment of the political party contribution limits; 2) events in this case and the litigation involving Missouri's individual limits that have occurred since the filing of the original complaint; and 3) the test for review of contribution limits articulated in *Nixon*. Defendants do not object to these proposed amendments and, the Court shall accordingly grant plaintiffs leave to amend as to these allegations only.

604 (1996) (plurality), was decided two years before they filed suit. Plaintiffs could have raised this issue in their original complaint (assuming they had facts to support such a challenge), but instead they merely challenged the constitutionality of the statute as it related to Missouri's impending enforcement proceedings against them for cash contributions in excess of the statutory limits. Although I will consider plaintiffs' argument that the limits on cash contributions should really be treated as expenditures, it is too late in the day to allow plaintiffs to challenge in this suit a different kind of financial support than was pleaded in the original complaint.

Plaintiffs' proposed amendments would also impose additional discovery requirements upon the parties and further delay final resolution of this case. Although in a different case these factors might not preclude granting leave to amend, the interests of justice favor timely resolution of the issues now before me. Defendants would be unduly prejudiced if plaintiffs were permitted to interject new issues into the case and impede a speedy and final ruling on the merits.

C. Contributions vs. Expenditures

Despite their position during the earlier phases of this case, plaintiffs now contend that the Missouri Republican Party's financial support of its candidates -- even if paid to the candidates directly -- should be classified as expenditures. The shift in plaintiffs' position is presumably to avoid application of *Nixon* and to fit this case within other Supreme Court precedent more favorable to plaintiffs' position.

So what, then, is at issue in this case: expenditures or contributions? There is no dispute that the financial support

at issue in this case was money given directly to the candidates by the Missouri Republican Party. The Party gave money to the candidates, and the candidates themselves -- not the Party -- spent the money. I believe these are contributions as a matter of law.

The distinction between contributions and expenditures is at the heart of this debate because, "[w]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (per curiam). *Nixon* quoted and reaffirmed *Buckley* on the significance of the difference between giving money and spending money:

> "[A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated symbolic act of contributing. At most, the size of his contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political

> communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." [*Buckley*, 424 U.S.] at 20-21, 96 S. Ct. 612 (footnote omitted).
>
> . . .
>
> We flagged a similar distinction between expenditure and contribution limitations in their impacts on the association right. While an expenditure limit "precludes most associations from effectively amplifying the voice of their adherents," *id.*, at 22, 96 S. Ct. 612 (thus interfering with the freedom of the adherents as well as the association), the contribution limits leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates," ibid.; see also id., at 28, 96 S. Ct. 612.

Nixon, 120 S. Ct. at 903-04.

In this case Missouri treated the Republican Party's money transfers to its candidates as contributions. It is true, as plaintiffs suggest, that the state's label of this kind of support as a "contribution" does not transform its financial support of its candidates into a "contribution" for constitutional purposes. *Buckley* and *Nixon* do that.

In an effort to reclassify the contributions as expenditures, plaintiffs make much of the fact that the Missouri Republican Party and its candidates engage in a

"significant degree of coordination, consultation, and cooperation" before the money is donated. For example, John Hancock testified that "[t]he Missouri Republican Party generally makes contributions to candidates in cooperation and concert with those candidates in order to advance the candidate's chance to win and to advance the party's objectives." (Hancock Aff. 11/13/98 ¶ 5). Moreover, plaintiffs contend that there is a tacit understanding that the candidate should use the Missouri Republican Party's contributions to convey their shared message. In his most recent affidavit, Hancock also avers that the Missouri Republican Party's comprehensive control over its cash contributions to its candidates is demonstrated by the fact that if a candidate does not use the funds in the manner demanded by the party, the Missouri Republican Party will refuse to contribute additional monies to the wayward candidate. (Hancock Aff. 3/12/ 00 ¶ 39).

Despite this purported tight-fisted control over the way the funds are spent and the candidates' future cash-flow, the undisputed fact remains that it is the candidate, not the Missouri Republican Party, who spends the money. Plaintiffs Pierce, Zahnd and Reid testified that "once my committee received the [Missouri Republican Party's] contributions, I was free to spend the money as I saw fit." (Pierce Aff. 11/16/ 98 ¶ 4; Zahnd Aff. 11/16/ 98 ¶ 3; Reid Aff. 11/16/ 98 ¶ 4). There is some dissenting authority that all monies spent by a political party -- whether independently or in coordination with a candidate -- should be treated as expenditures, see *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n,* 518 U.S. 604 (1996) (Kennedy, J. dissent), but even that reasoning would not apply here because the candidates, not the party, are spendi..g

the funds.[3] The transformation of the Missouri Republican Party's contributions into political debate involves speech by the individual plaintiffs Pierce, Zahnd and Reid, not by the Missouri Republican Party. *See Buckley*, 424 U.S. at 21. For this reason, plaintiffs' attempt to reclassify the cash support as expenditures rather than contributions fails.

C. Contribution Limits on Political Parties after *Nixon*

Of course, the determination that the money given should be considered a contribution does not end the constitutional inquiry, for states are not free under the First Amendment to impose contribution limits without rhyme or reason. I must now decide whether and how Missouri may regulate contributions by political parties. The answer to the "whether" question depends on whether contributions made by political parties are subject to the same standards applied to contributions made by individuals and entities other than political party committees. If they are, there is little doubt that *Nixon* answers the "how" question.

1. The "Whether" Question

In *Nixon*, the Supreme Court adopted the analytical framework first set out in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and held that state contribution limits "could survive if the [g]overnment demonstrated that

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[3] Of course, under Justice Thomas' approach in *Colorado Republican*, the distinction between expenditures and contributions would be eliminated for purposes of determining the constitutionality of campaign finance legislation because he "rejects the framework established by *Buckley v. Valeo* . . . ." 518 U.S. at 631 (Thomas, J.).

contribution regulation was closely drawn to match a sufficiently important interest, though the dollar amount of the limit need not be fine tuned." *Nixon*, 120 S. Ct. at 904 (internal quotation marks and citations omitted). Rather than setting a specific dollar amount as the minimum constitutional threshold for contribution limits, the Supreme Court defined the relevant test as "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id.* at 909.

In support of its holding, the Court reaffirmed the distinction between contributions and expenditures for purposes of evaluating the constitutionality of campaign finance legislation. *Id.* at 903-05. The Court also accepted the state's espoused interests in defending the legislation (the prevention of corruption and the appearance of corruption) without the rigorous evidentiary showing required by the Eighth Circuit in its decision in the case, *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998). Instead, the Court relied in part upon the evidence presented in *Buckley* to demonstrate that the state's anti-corruption rationale was sufficiently supported to justify Missouri's contribution limits on individuals. 120 S. Ct. at 905-08.[4]

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[4] While declining to further define the state's evidentiary obligations in connection with justifying contribution limits, the Court also pointed to the "evidence introduced into the record by respondents or cited by the lower courts in this action and the action regarding Proposition A [as] enough to show that the substantiation of the congressional concerns reflected in *Buckley* has its counterpart supporting the Missouri law." *Id.* at 907.

Although *Nixon* does not directly answer the question of whether contribution limits on political parties are evaluated under the same standards applied to contribution limits on individuals, it answers the question indirectly by making clear that their constitutionality hinges on the type of financial support being given to the candidate, not on the identity of the contributor: "[R]estrictions on contributions require less compelling justification than restrictions on independent spending." *Nixon*, 120 S. Ct. at 904 (quoting *Federal Election Com'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986)). The *Nixon* decision affirms the validity of Missouri's contribution limits generally and the state's supporting anti-corruption rationale. Because *Nixon* expressly approved Missouri's claimed interests in limiting individual contributions, it follows that the state's corresponding limits on political parties must also be upheld as long as the same rationale applies and they meet the criteria set out in *Nixon*.

Defendants assert that limits on contributions by political parties are constitutionally justified because they: 1) prevent evasion of the very contribution limits on individuals that *Nixon* upheld (the "anti-evasion rationale"); and 2) promote the state's interest in preventing corruption and the appearance of corruption in the electoral process (the "anti-corruption rationale"), an interest expressly approved by the Court in *Nixon*.

Plaintiffs attack the state's rationale by claiming: 1) the state's espoused anti-corruption interest loses its force in the context of contributions by political parties; and 2) the contribution caps on political parties do not promote the state's anti-evasion rationale because they do not prevent evasion of the individual contribution limits.

Plaintiffs' first point finds support in *Colorado Republican*, where the Supreme Court held that limits on independent expenditures by political parties in federal elections violate the First Amendment. 518 U.S. at 618. Seven members of the Court supported the Court's judgment that limits on a political party's independent expenditures (i.e., expenditures made by a political party that are not coordinated with a candidate) violate the First Amendment. Justice Breyer announced the judgment of the Court and delivered an opinion, joined by Justices O'Connor and Souter, finding that limits on independent expenditures violate the First Amendment. Four other members of the Court -- Chief Justice Rehnquist and Justices Kennedy, Scalia and Thomas -- would have held that limits on both independent and coordinated expenditures (which are considered contributions pursuant to § 441a(a)(7)(B)(I) of the Federal Election Campaign Act or FECA) violate the First Amendment. *Id.* at 626. Justices Kennedy and Thomas each authored opinions concurring in the judgment and dissenting in part. It is these opinions upon which plaintiffs so heavily rely.

Justice Kennedy argued that the "central holding" of *Buckley* is "that spending on one's own speech must be permitted, . . . and this is what political parties do" when they make expenditures on behalf of their candidates. *Id.* at 627. For this reason, Justice Kennedy would have held that "[p]arty spending 'in cooperation, consultation, or concert with' a candidate . . . is indistinguishable in substance from expenditures by the candidate or his campaign committee," and both are protected by the First Amendment. *Id.* at 630. However, Justice Kennedy also recognized that "Congress may have authority, consistent with the First Amendment, to restrict undifferentiated political party contributions which satisfy the constitutional criteria we discussed in Buckley, but

that type of regulation is not at issue here." *Id.* Unfortunately for plaintiffs, that is exactly the type of regulation at issue here, so Justice Kennedy's opinion does not provide supporting authority for their position.

Justice Thomas' opinion provides more help to plaintiffs. He found that the "anti-corruption rationale" for contribution limits "loses its force" when "applied in the specific context of campaign funding by political parties" as follows:

> What could it mean for a party to "corrupt" its candidate or to exercise "coercive" influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes . . . For instance, if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then implements the Party's platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system.

518 U.S. at 646. While I find Justice Thomas' reasoning concerning the nature of political parties appealing as a policy statement, I believe that *Nixon* requires me to reject it for purposes of deciding this case.

The *Nixon* Court distinguished *Colorado Republican* as inapposite on contribution limits because "the issue in question was limits on independent expenditures by political parties, which the principal opinion expressly distinguished from contribution limits." 120 S. Ct. at 907 . Given this

latest pronouncement by (a majority of) the Supreme Court on the inapplicability of *Colorado Republican* to campaign contribution limits, I am not free to strike down Missouri's contribution limits by relying upon partially dissenting opinions issued in that case.

I am also not persuaded that the reasoning of the lower courts which considered the *Colorado Republican* case on remand has any application to this case. First, I do not believe the Tenth Circuit correctly applied *Nixon*.[5] More

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[5] Because the Supreme Court lacked a majority to decide the "broader issue" of the constitutionality of coordinated expenditures, it remanded the case for further development of that issue. 518 U.S. at 626. A substantial additional record was created and then the district court, ruling before *Nixon* was decided, found that limitations on coordinated expenditures by political parties also violated the First Amendment. *See Federal Election Com'n v. Colorado Republican Federal Campaign Committee,* 41 F. Supp. 2d 1197, 1213 (D. Col. 1999). The Tenth Circuit then affirmed, in a decision rendered after *Nixon*, and held that the FEC had failed to meet its burden of showing that the anti-corruption rationale applied to political party coordinated expenditures, which FECA defines as "contributions." *Federal Election Com'n v. Colorado Republican Federal Campaign Committee*, 2000 WL 554688 (10th Cir. May 5, 2000). Although the Tenth Circuit majority stated that it was applying the *Nixon* standard, I believe that it in fact imposed a higher evidentiary burden not unlike that previously required by the Eighth Circuit and overruled by *Nixon*. Certainly, the Tenth Circuit expressed "difficulty" and "question" in applying the standard to party coordinated expenditures, *id.* at *5, stating that "simple cubbyholding of constitutional values under the labels of 'contribution' and 'expenditure' cheapens the currency." *Id.* at

importantly, this case is about money the Missouri Republican Party gave to the candidates, not about money the Republican Party spent on radio ads or other candidate campaign needs.

When the anti-corruption rationale is viewed in tandem with the anti-evasion rationale, as I believe it should be, Justice Thomas' *Colorado Republican* reasoning becomes less persuasive. Missouri's contribution limits on political parties work to prevent corruption and the appearance of corruption in part by precluding contributors from evading the state's individual limits found constitutional in *Nixon.*

Beginning in *Buckley,* the Supreme Court recognized the need to deter evasion of individual limits as a constitutionally valid justification for imposing additional contribution limits. The *Buckley* Court upheld FECA's $25,000 "per election cycle" ceiling on the amount of contributions by a single individual to any combination of candidates for federal office as follows:

> The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that

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*11.

> candidate, or huge contributions to the candidate's political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

424 U.S. at 38. The Supreme Court upheld this "corollary" provision of FECA without any discussion of the issues of corruption, the appearance of corruption or other compelling interests that it discussed at length in connection with upholding the per candidate contribution limits on individuals. *Id.*

The Supreme Court later applied the anti-evasion rationale to uphold limits on contributions made to political action committees in *California Medical Assoc. v. Federal Election Comm'n*, 453 U.S. 182 (1981). Justice Marshall, delivering a part of the opinion of the Court in which only four justices joined, noted that "Congress enacted [the limitations on contributions to political action committees] in part to prevent circumvention of the very limitations on contributions that this Court upheld in Buckley." *Id.* at 197-98 (Marshall, J.). He further stated that "it is clear that this provision [of FECA] is an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in Buckley." *Id.* at 199. Casting the deciding fifth vote, Justice Blackmun agreed that even under a rigorous standard of review, "contributions to multi-candidate political committees may be limited to $5,000 per year as a means of preventing evasion of the limitations on contributions to a candidate or his authorized campaign committee upheld in Buckley." *Id.* at 203 (Blackmun, J.). This result followed because "[t]he

statute challenged here is thus analogous to the $25,000 limitation on total contributions in a given year that Buckley held to be constitutional." *Id.* Once again, the Court upheld the statute without requiring a separate evidentiary showing that the ancillary limits actually prevented corruption or the appearance of corruption.

Given these cases establishing the importance of ancillary contribution limits to deter evasion of individual limits, the state may justify its contribution limits on political parties with its stated rationale.[6] Plaintiffs protest that defendants have not provided sufficient evidence demonstrating that contribution limits on political parties are necessary to deter evasion of the individual limits in this particular case. They also contend that the statute does not actually deter evasion, because determined contributors can easily circumvent the individual limits even with the political party contribution limits in place. These arguments fail.

As for plaintiffs' first argument, the Supreme Court in *Nixon* made clear that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." 120 S. Ct. at 906. Because the Supreme Court has plainly recognized the anti-evasion rationale as sufficient to justify ancillary contribution limits, *see Buckley*, 424 U.S. at 38, the state's use of the same justification here cannot be deemed "novel" or "implausible."

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[6] Even the recent Tenth Circuit decision following remand in *Colorado Republican* recognized the validity of the anti-evasion rationale, stating that "if an individual used the party as a conduit to channel money to specified candidates, this would certainly threaten the integrity of the individual contribution limit." 2000 WL 554688 at *10.

Moreover, the Supreme Court has never required empirical proof independent of that needed to justify individual contribution limits to legitimate reliance upon the anti-evasion rationale. *See id.; CalMed*, 453 U.S. at 197-99 (Marshall, J.); *id.* at 203 (Blackmun, J. concurring). Missouri certainly does not need to present evidence to justify its individual contribution limits after *Nixon*, and it does not need to present empirical proof to justify the state's interest in combating evasion of those limits through the use of contribution limits on political parties after *Buckley*.

Plaintiffs' second argument also fails. *Nixon* makes clear that the state's contribution regulations need not be the least restrictive means available for addressing the issue of campaign finance reform, only that they be "closely drawn" to match a "sufficiently important interest." 120 S. Ct. at 904. Because Missouri's contribution limits on political parties do prevent individuals from using political parties as a conduit for making large contributions to a candidate in excess of the individual limits (even if it does not eliminate the practice entirely), I find the statute is "closely drawn" to meet this "sufficiently important interest." *See id.* That Missouri could, or even should, enact more stringent campaign finance laws to quash this practice in its entirety does not invalidate the salutary measures already in effect.

For these reasons, Missouri may regulate contributions by political parties under the standards set forth in *Buckley* and *Nixon*.

2. The "How" Question

Because *Buckley* and *Nixon* govern the outcome of this case, Missouri's campaign contribution limits on political parties do not violate the First Amendment unless they are

"so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Nixon*, 120 S. Ct. at 909.

Plaintiffs cannot seriously contend that the contribution limits at issue here would run afoul of *Nixon*, given that they were enacted in conjunction with Missouri's individual limits and that "in the period since the Missouri limits became effective candidates for state elected office have been quite able to raise funds sufficient to run effective campaigns, and . . . candidates for political office in the state are still able to amass impressive campaign war chests." *Id.* at 909 (internal quotation marks and citations omitted).[7]

For a limit to be unconstitutional, there must be a "showing that the limits were so low as to impede the ability of candidates to amass the resources necessary for effective

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[7] Although *Nixon* only involved the race for state auditor (one of the races also challenged here), the evidence presented to me in that case included campaign finance data from races for other state offices. *See Shrink Missouri Gov't PAC v. Adams*, 5 F. Supp. 2d 734, 740-41 (E.D. Mo. 1998). In finding that "candidates for state elected office have been quite able to raise funds sufficient to run effective campaigns, and . . . candidates for political office in the state are still able to amass impressive campaign war chests," *Nixon*, 120 S. Ct. at 909, the Supreme Court also relied on this evidence. I therefore agree with defendants that the Supreme Court's findings on this point are not simply limited to the race for state auditor. In any event, there has been no evidence presented in this case that would lead me to find that the Supreme Court's conclusions in *Nixon* do not apply with equal force to Missouri's state senate campaigns as well.

advocacy." *Buckley*, 424 U.S. at 21. As *Nixon* made clear, such a showing cannot be made through isolated examples of how a contribution limit has impeded a candidate's fundraising ability. 120 S. Ct. at 909. Instead, the test requires a showing of a "system" of suppressed speech, *see id.* , a showing that is practically precluded by the Supreme Court's recent determination that such a system does not exist in Missouri's current political climate. Given the Supreme Court's findings on this point, I fail to see how the contribution limits on political parties -- which are ten times higher than those found constitutional in *Nixon* -- could destroy Missouri's burgeoning campaign climate and create a system of suppressed political advocacy.

I have carefully reviewed the campaign finance data submitted by both parties, which includes evidence presented to the Supreme Court in *Nixon*. I see no reason to engage in a lengthy recitation of that data here. Based on these submissions, I find no evidence that the contribution limits on Missouri's political parties have "impede[d] the ability of candidates to amass the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. Instead, the undisputed evidence demonstrates that campaign expenditures by candidates have increased in some cases and decreased in others following the imposition of contribution limits. Contrary to plaintiffs' assertions, this evidence does not create a factual dispute precluding summary judgment. Rather, it establishes that, whatever the source of decreased spending, contribution limits have not suppressed political advocacy system-wide or rendered contributions pointless, especially when overall spending remains quite high in absolute terms.

Nor does plaintiffs' anecdotal evidence -- which includes stories from the former chair of the Missouri

Republican Party about a candidate who allegedly declined to run for state representative in 1998 because he could not receive more start-up funds and the party's discouraging a primary election campaign between two of the Republican Party's gubernatorial candidates in 1996 because of contribution limits -- "point up a system of suppressed political advocacy that would be unconstitutional under Buckley." *Nixon*, 120 S. Ct. at 909. At best, these stories are isolated examples of alleged suppression that still do not amount to the system-wide failure required under *Nixon*. At worst, they are simply speculation about the effects of Missouri's contribution limits without any evidence of causation. In either event, they do not preclude summary judgment.

IV. Conclusion

Were I writing this opinion on a blank slate, I might well conclude that political parties should be exempted from the legal standards governing other kinds of campaign contributors because of their special role in American politics. I might even adopt the approach advocated by Justice Thomas in *Colorado Republican* and begin with the premise that "[i]n principle, people and groups give money to candidates and other groups for the same reason that they spend money in support of those candidates and groups: because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy." 518 U.S. at 640 (Thomas, J.). I am not writing on blank slate, however, and cannot disregard the teachings of our highest court in favor of a different rule of law. I therefore find that Missouri's campaign contribution limits on political parties do not violate the First Amendment. This is a matter of law: there are no factual disputes remaining for trial, and so I will grant summary judgment to defendants.

The parties have indicated both to me and to the Eighth Circuit Court of Appeals that an appeal of this decision is certain. Despite my belief that this decision is the correct one under Supreme Court precedent, I remain concerned about the same issues that convinced me to leave the preliminary injunction in place pending this decision. I will therefore withhold granting the motion for summary judgment and entry of final judgment for a short time, to give the parties an opportunity to tell me their positions regarding an injunction pending appeal.

I believe resolution of this issue is best suited to an oral argument rather than further briefing. The trial of this matter set for July 5, 2000, will, of course, not be necessary, so the Court will use that time for the hearing.

Accordingly,

IT IS HEREBY ORDERED that the parties shall appear in Courtroom 3B at 9:30 a.m. on Wednesday, July 5, 2000, to present their positions regarding whether I should issue an injunction pending appeal. Final judgment in accordance with this opinion will not be entered until after the hearing and, of course, the preliminary injunction will remain in effect until that time.

IT IS FURTHER ORDERED that plaintiffs' motion for leave to amend their complaint [#64] is granted only to the extent set out in footnote 2 of this opinion, and is denied in all other respects.

IT IS FURTHER ORDERED that defendants' motion to compel and in limine [# 76-1, 76-2] is denied as moot.

IT IS FURTHER ORDERED that as no trial will take

place, the parties are not obligated to file pretrial submissions.

/s/
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 22nd day of June, 2000.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2686EMSL

MISSOURI REPUBLICAN PARTY,
A Political Party Committee, etc., et al.,
Appellants,
v.

CHARLES G. LAMB, In his official capacity
as Executive Director of the Missouri
Ethics Commission, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

July 31, 2000

CORRECTED ORDER

Appellees, their successors, agents, and employees are enjoined from implementing, enforcing, or acting in reliance

upon RSMo. §§ 130.032.4, 130.032.7 during the pendency of this appeal.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent from the entry of the order enjoining Missouri from enforcing its limits on political party contributions pending appeal.

To determine whether an injunction pending appeal is warranted, we must consider (1) the likelihood of success on the merits of the appeal, (2) the likelihood of irreparable harm to appellants in the absence of the injunction, (3) the absence of substantial harm to other interested parties if the injunction is granted, and (4) the absence of harm to the public interest if the injunction is granted. *See Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998). Indeed, we have characterized these factors as "requirements." *Id.* The most important factor is likelihood of success on the merits. *See id.*

The court today in granting the injunction engages in none of the analysis required by our precedent. Lacking such analysis, the injunction is without support. In my view, appellants make an inadequate showing of likelihood of success on the merits so that when balanced with the other factors, an injunction pending appeal is not justified.

In upholding the limits on contributions that political parties may make to candidates, the district court carefully and faithfully applied the teachings of Supreme Court in *Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897 (2000), and *Buckley v. Valeo*, 424 U.S. 1 (1976). It found that there were no genuine disputes of material fact that would preclude summary judgment, and turned to the issue of

whether the Missouri Republican Party's provision of funds were contributions or expenditures. The court stated there was no dispute that the party gave the funds to the candidates, and that the candidates, not the party, spent the money in spite of the control exercised by the party. Three of the candidates testified that "once my committee received the . . . contributions, I was free to spend the money as I saw fit." Based upon the facts before it, the district court concluded that the funds were contributions.

The court distinguished *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), which held unconstitutional limits on expenditures by political parties as applied to independent expenditures made by the Colorado committee. The district court expressed some agreement with Justice Thomas's separate opinion in *Colorado Republican*, which casts doubt on the anti-corruption rationale for contribution limits in the context of political party contributions, but rejected its reasoning in light of *Nixon*. Thus, Missouri's contribution limits were constitutional unless they were "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Nixon*, 120 S.Ct. at 909. After examining the record, the district court concluded there was evidence that the contribution limits on Missouri's political parties have prevented candidates from "amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

It is my conclusion that the appellants have not demonstrated that they are likely to succeed on the merits, and accordingly have not shown a likelihood of irreparable harm in the absence of an injunction. Nor is there any showing with respect to the public interest.

When the case is fully briefed and arguments are made, I certainly will revisit the issue and carefully study whether the district court reached the correct conclusion. The legal issues in the case are complex as demonstrated by the numerous separate opinions in *Buckley, Colorado Republican*, and *Nixon*. I am of the view, however, that on the record before us, our requirements for granting an injunction pending appeal have not been met.

I would deny the motion.

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2686EMSL

MISSOURI REPUBLICAN PARTY, et al.,
Appellants,
v.

CHARLES G. LAMB, et al.,
Appellees.

ORDER DENYING PETITION FOR REHEARING
AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. Judge

McMillian would grant the petition.

The petition for rehearing by the panel is also denied.

(5128-010199)

September 7, 2000

Order Entered at the Direction of the Court.

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:98CV1909 CDP

MISSOURI REPUBLICAN PARTY, et al.,
Plaintiffs,

v.

CHARLES G. LAMB, et al.,
Defendants.

January 13, 1999

MEMORANDUM AND ORDER

This matter is before the Court on plaintiffs' motion for a preliminary injunction. Plaintiffs seek to enjoin defendants from implementing, enforcing, or acting in reliance upon Missouri statutory provisions regulating contributions made by or accepted from a political party committee to a candidate for state office in any one election. Plaintiffs contend that those provisions impermissibly infringe on their first amendment rights. For the reasons stated below, the Court will grant plaintiffs' motion.

I. Background

Plaintiff Missouri Republican Party is a political party committee as defined by Missouri Revised Statute § 130.011(25). Plaintiff Charles A. Pierce was the Republican candidate for Missouri state auditor in the 1998 general election; plaintiff Pierce for Auditor is a Missouri candidate committee, as defined by Missouri Revised Statute § 130.011(9); and plaintiff Marc Ellinger is treasurer of that committee. Plaintiff Eric Zahnd was the Republican candidate for the Missouri State Senate for the 34th District in the 1998 general election; plaintiff Citizens for Eric Zahnd is a Missouri candidate committee, and plaintiff Lee R. Keith is treasurer of that committee. Plaintiff Michael J. Reid was the Republican candidate for Missouri State Senate for the 78th District in the 1998 general election; plaintiff Citizens for Mike Reid is a Missouri candidate committee; and plaintiff Elaine Tschee Reid is treasurer of that committee.

Defendant Charles G. Lamb is executive director of the Missouri Ethics Commission ("Ethics Commission"); defendants Robert Gardner and Patricia Flood are chair and vice-chair, respectively, of that commission; and defendants Richard Adams, Elaine Spielbusch, Donald Gann, and Mike Greenwell are members of that commission. Defendant Jeremiah W. Nixon is the Missouri attorney general.

Missouri Revised Statute § 130.032.4 limits the amount of cash and in-kind contributions that a political party committee can make and accept in any one election. The subsection reads, in relevant part, as follows:

> Except as limited by this subsection, the amount of cash contributions, and a separate amount for the amount of in-kind contributions, made by or accepted

from a political party committee in any one election shall not exceed the following:

(1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor, or attorney general, ten thousand dollars;

(2) To elect an individual to the office of state senator, five thousand dollars;

(3) To elect an individual to the office of state representative, two thousand five hundred dollars; and

(4) To elect an individual to any other office of an electoral district, ward or unit, ten times the allowable contribution limit for the office sought.

Missouri Revised Statute § 130.032.2 requires that the limits contained in § 130.032.4 be adjusted for inflation in each even-numbered year by a calculation employing the cumulative consumer price index. In early 1998, the Ethics Commission increased the limits listed in § 130.032.4(1)-(3) to $10,750, $5,250, and $2,750, respectively.

Under Missouri Revised Statute § 130.032.7, any committee that accepts or gives contributions in excess of the statutory limits is subject to a significant penalty, unless the contribution is promptly returned to the contributor after notification of the violation is received from the Ethics Commission. *See* Mo. Rev. Stat. § 130.032.7. The per-contribution penalty is one thousand dollars plus an amount

equal to the contribution. *Id.* The candidate and the candidate committee treasurer (or deputy treasurer) are personally liable for payment of that penalty. *Id.* Alternatively, they may pay the penalty from campaign funds existing on the date that the committee was notified of the violation by the Ethics Commission. *Id.*

In the 1998 general election, plaintiff Missouri Republican Party made a number of monetary contributions to plaintiffs Pierce for Auditor, Citizens for Eric Zahnd, and Citizens to Elect Mike Reid. In the case of each of those candidate committees, the Republican Party's contributions were in excess of the aforementioned statutory limits. As a result, the Ethics Commission, in late October and early November 1998, separately notified plaintiffs Ellinger, Zahnd, Keith, and the Reids that their committees were in violation of § 130.032.4's limits, and demanded that they return the Republican Party's contributions to the extent that they exceeded those limits. Shortly thereafter, counsel for plaintiffs informed James R. Layton, Missouri's chief deputy attorney general, that plaintiffs intended to file a suit seeking to enjoin enforcement of § 130.032.4. On November 16, 1998, Layton advised plaintiffs' counsel that the Ethics Commission would not seek to enforce § 130.032.4 against plaintiffs pending a hearing on their request for a preliminary injunction. Plaintiffs filed this action on that same day.

On November 18, 1998, the Court held a telephone conference with counsel for all parties. At that conference, counsel agreed that the Court should rule on plaintiffs' preliminary injunction request based on the written record, and that no hearing would be necessary. The Court accordingly set a briefing schedule, and the motion is now fully briefed.

II. Discussion

The standards for deciding a motion for a preliminary injunction are well-settled. The court must consider: (1) the likelihood that the movant will succeed on the merits of its claim, (2) the threat of irreparable harm to the movant, (3) the balance between that harm and the injury that granting the. injunction may inflict on other interested parties, and (4) whether the issuance of an injunction is in the public interest. *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1178-79 (8th Cir. 1998); *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). The court must examine each factor in determining "whether the balance of equities weighs toward granting the injunction." *United Indus. Co.*, 140 F.3d at 1179. While no single factor is dispositive, the "most important" is the probability that the movant will succeed on the merits. *Shrink Missouri Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998).

Plaintiffs argue that all four of the abovementioned factors weigh in favor of granting an injunction. They contend that a political party's contributions to its candidates are entitled to protection under the first amendment and that Missouri cannot prove that campaign contributions made by political parties cause either corruption or an objectively reasonable appearance thereof. They also argue that if the Court does not grant the injunction, their ability to promote their political ideas will be seriously hampered.[1] They assert

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[1] For example, John Hancock, executive director of plaintiff Missouri Republican Party, states in his affidavit that unless an injunction issues, the party either will have insufficient funds to make contributions to Republican candidates in the future or will be reluctant to make such contributions. Plaintiff Ellinger attests that he is seriously

that the balance of harms tips in their favor because an injunction would merely restore the status quo that existed before the contribution limits were enacted in 1994. Finally, plaintiffs contend that the public's interest in protecting first amendment freedoms strongly supports the granting of an injunction.

For their part, defendants argue that Missouri's limits on contributions by political parties withstand the exacting scrutiny that any regulation of first amendment rights must be given. They contend that imposing limits on contributions by political parties prevents evasion of Missouri's requirement that candidates disclose the sources of their contributions, see Mo. Rev. Stat. § 130.041, and further assert that those limits operate to combat circumvention of the state's contribution limits on individuals.

As recent Eighth Circuit law makes clear, a state may not constitutionally abridge "political speech in the form of campaign contributions," *Russell v. Burris*, 146 F.3d 563, 568 (8th Cir.), *cert. denied*, 67 U.S.L.W. 3177 (U.S. Nov. 16, 1998) (Nos. 98-397, 98-399), unless it has either (a) demonstrable evidence of actual undue influence or corruption stemming from such contributions, or (b) similar evidence from which a reasonable person could perceive "that such contributions make for undue influence or spawn corruption."[2] *Id.* at 569; *Shrink Missouri Gov't PAC v.*

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considering running for elected office in the future, and that the Ethics Commission's enforcement actions, if not enjoined, will damage his ability to establish committees and secure financing for a campaign.

[2] The mere fact that an elected official supports legislation also favored by contributors to his or her campaign

Adams, 161 F.3d 519 (8th Cir. 1998) ("*Shrink II*"). In *Shrink II*, which involved a challenge to Missouri's restrictions on contributions by individuals to candidates for state office, the court of appeals directed entry of summary judgment against the state, finding that it was "unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest" in curbing corruption, real or perceived. 161 F.3d at 522.

The Court finds that plaintiffs have met their burden, and are entitled to a preliminary injunction. In the Court's view, the case law is squarely in plaintiffs' favor, and their success on the merits is, therefore, likely. The effect of Shrink II is that Missouri currently has no valid limit on the amount of money that an individual may give to a candidate for state office. Thus, it appears that one of the purported objectives of the contribution limits at issue here (i.e., thwarting a person from evading the limit on the amount that he or she can legitimately give to a given candidate) has ceased to have any force whatsoever. With respect to plaintiffs' disclosure argument, the Court observes that § 130.041's requirements appear also to apply to campaign committees, candidate committees, and political party committees. Indeed, exhibit seven to defendants' opposing memorandum is a copy of the Missouri Republican Party's October 27, 1998, disclosure report to the Ethics Commission. In section A of that report, the party listed by name over seventy contributors to the party, together with the amount given by each. Thus, it seems that if one wanted to know what individuals or corporations enabled the Republican Party to make a substantial contribution to Candidate X, one could readily find out. Finally, the Court has some doubt whether the anti-corruption rationale used to

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does not constitute such evidence. *Russell*, 146 F.3d at 569.

justify limits on contributions by individuals is of equivalent relevance in the context of political party contributions. *See Russell,* 146 F.3d at 571 ("There is . . . less of a danger of *quid pro quo* corruption, such as the sort that one might presume from large contributions given directly to candidates, when a contribution is given to a PAC that does not itself wield legislative power."); *cf. Colorado Republican Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604, 617 (1996) ("[A]n independent expenditure made possible by a $20,000 donation, but controlled and directed by a party rather than the donor, would seems less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor.").

The other *Dataphase* factors also militate in plaintiffs' favor. Because enforcement of § 130.032.4's limits impairs plaintiffs' ability to promulgate and advance their political beliefs and ideas, plaintiffs face the threat of irreparable harm if an injunction is not granted. The Court also agrees with plaintiffs that the balance between that harm and the injury that granting the injunction may cause defendants and other interested parties tips decidedly towards plaintiffs. Lastly, the Court finds that as plaintiffs' motion appears to have a sound constitutional underpinning, issuing the injunction is in the public interest.

Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion for a preliminary injunction [#7] is granted, and that defendants, their successors, agents, and employees are enjoined and restrained from implementing, enforcing, or acting in reliance upon Missouri Revised Statutes §§ 130.132.4 and 130.132.7 until further order of this Court.

IT IS FURTHER ORDERED that plaintiffs shall, no later than **January 15, 1999**, post with the Clerk of Court the sum of $250.00 as security, pursuant to Rule 65(c), Fed. R. Civ. P.

IT IS FURTHER ORDERED that plaintiffs' motion to file a memorandum in excess of fifteen pages [# 8] is granted *nunc pro tunc*.

IT IS FURTHER ORDERED that the parties shall provide the Court, on or before January 25, 1999, with a joint proposal for the procedure to be used in resolving this case on the merits, whether by motion and briefing schedule, or by trial or evidentiary hearing. If the parties are unable to agree on a procedure, the joint proposal shall set forth in detail any areas of disagreement.

/s/
CATHERINE D.PERRY
UNITED STATES DISTRICT JUDGE

Dated this 13th day of January, 1999.

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:98CV1909 CDP

MISSOURI REPUBLICAN PARTY, et al.,
Plaintiffs,

v.

CHARLES G. LAMB, et al.,
Defendants.

March 13, 2000

MEMORANDUM AND ORDER

This matter is before the Court on defendants' motion to vacate the preliminary injunction issued on January 13, 1999. In that order, the Court enjoined enforcement of Missouri's laws limiting campaign contributions made by political party committees to their candidates. *Missouri Republican Party v. Lamb*, 31 F. Supp. 2d 1161 (E.D. Mo. 1999). Pursuant to an agreement reached by the parties, the Court thereafter stayed all further proceedings in this action pending the United States Supreme Court's decision in *Nixon*

v. Shrink Missouri Gov't PAC, cert. granted, 119 S. Ct. 901 (1999).

On January 24, 2000, the Supreme Court decided *Nixon*, and upheld Missouri's limits on campaign contributions made by individuals and entities other than political parties. *See Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897 (2000). Based on that opinion, defendants moved the Court on the same date to vacate the injunction. Plaintiffs oppose the motion to vacate, and the issues have been fully briefed. Because this case raises substantial and unsettled issues concerning regulation of the speech and associational rights of Missouri's political parties, the Court will continue the preliminary injunction. The Court will also set the matter for expedited briefing and a hearing on the merits.[1]

I. Background

The relevant background facts remain unchanged since the Court issued its preliminary injunction on January 13, 1999. Plaintiff Missouri Republican Party is a political party committee as defined by Missouri Revised Statute § 130.011(25). Plaintiff Charles A. Pierce was the Republican candidate for Missouri state auditor in the 1998 general election; plaintiff Pierce for Auditor is a Missouri candidate committee, as defined by Missouri Revised Statute §

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[1] Of course, any findings of fact and conclusions of law forming part of the Court's decision are subject to the "general rule" that "'the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.'" *Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958, 962 (8th Cir. 1995) (*quoting University of Texas v. Camenisch*, 451 U.S. 390 (1981)).

130.011(9); and plaintiff Marc Ellinger is treasurer of that committee. Plaintiff Eric Zahnd was the Republican candidate for the Missouri State Senate for the 34th District in the 1998 general election; plaintiff Citizens for Eric Zahnd is a Missouri candidate committee, and plaintiff Lee R. Keith is treasurer of that committee. Plaintiff Michael J. Reid was the Republican candidate for Missouri State Senate for the 78th District in the 1998 general election; plaintiff Citizens for Mike Reid is a Missouri candidate committee; and plaintiff Elaine Tschee Reid is treasurer of that committee.

Defendant Charles G. Lamb is executive director of the Missouri Ethics Commission ("Ethics Commission"); defendants Robert Gardner and Patricia Flood are chair and vice-chair, respectively, of that commission; and defendants Richard Adams, Elaine Spielbusch, Donald Gann, and Mike Greenwell are members of that commission. Defendant Jeremiah W. Nixon is the Missouri attorney general.

Missouri Revised Statute § 130.032.4 limits the amount of cash and in-kind contributions that a political party committee can make and accept in any one election. The subsection reads, in relevant part, as follows:

> Except as limited by this subsection, the amount of cash contributions, and a separate amount for the amount of in-kind contributions, made by or accepted from a political party committee in any one election shall not exceed the following:
>
> (1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state

auditor, or attorney general, ten thousand dollars;

(2) To elect an individual to the office of state senator, five thousand dollars;

(3) To elect an individual to the office of state representative, two thousand five hundred dollars; and

(4) To elect an individual to any other office of an electoral district, ward or unit, ten times the allowable contribution limit for the office sought.

Missouri Revised Statute § 130.032.2 requires that the limits contained in § 130.032.4 be adjusted for inflation in each even-numbered year by a calculation employing the cumulative consumer price index. In early 1998, the Ethics Commission increased the limits listed in § 130.032.4(1)-(3) to $10,750, $5,250, and $2,750, respectively.

A committee that accepts or gives contributions in excess of the statutory limits is subject to a significant penalty, unless it promptly returns the contribution to the contributor after being so instructed by the Ethics Commission. *See* Mo. Rev. Stat. § 130.032.7. The per-contribution penalty is one thousand dollars plus an amount equal to the contribution. *Id.* The candidate and the candidate committee treasurer (or deputy treasurer) are personally liable for payment of that penalty. *Id.* Alternatively, they may pay the penalty from campaign funds existing on the date that the committee was notified of the violation by the Ethics Commission. *Id.*

II. Discussion

In deciding whether to vacate a preliminary injunction, the Court must apply the same standards it used when issuing the injunction in the first instance. *See Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994) (district court should apply *Dataphase* factors when deciding whether to rescind preliminary injunction). These standards are well-settled and require the Court to consider: (1) the likelihood that the movant will succeed on the merits of its claim, (2) the threat of irreparable harm to the movant, (3) the balance between that harm and the injury that granting the injunction may inflict on other interested parties, and (4) whether the issuance of an injunction is in the public interest. *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1178-79 (8th Cir. 1998); *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). The court must examine each factor in determining "whether the balance of equities weighs toward granting the injunction." *United Indus. Co.*, 140 F.3d at 1179. Thus the question the Court must consider is whether, in light of *Nixon*, it would enjoin enforcement of Missouri's campaign contribution laws as applied to political party committees. As discussed below, the answer is "yes."

A. Likelihood of Success on the Merits

Defendants contend that plaintiffs' likelihood of success on the merits of their claim is doubtful given the Supreme Court's rejection in *Nixon* of the analysis previously employed by the Eighth Circuit Court of Appeals in *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998), and *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998) (*Shrink II*), *rev'd sub nom., Nixon*, 120 S. Ct. 897 (2000). Because the undersigned relied on the Eighth Circuit's

approach in *Russell* and *Shrink II* to enjoin enforcement of the contribution limits at issue here, defendants contend that the plaintiffs' position (and the Court's order granting the preliminary injunction) are now devoid of legal support.

Defendants further assert that Missouri's limits on contributions by political parties withstand the level of scrutiny applied by the *Nixon* Court when discussing the regulation of first amendment rights in the context of Missouri's contribution limits on individuals. They contend that imposing limits on contributions by political parties: 1) prevents evasion of Missouri's contribution limits on individuals, which have been upheld in Nixon ("anti-evasion rationale"); and 2) promotes the state's interest in preventing corruption and the appearance of corruption in the electorate process ("anti-corruption rationale"), an interest expressly sanctioned by the Court in *Nixon*.

Not surprisingly, plaintiffs argue that defendants paint the import of *Nixon* with too broad a brush. For their part, plaintiffs claim that the Supreme Court's holding in *Nixon* did not address the validity of campaign contribution limits on political party committees. They maintain that a political party's contributions to its candidates are entitled to protection under the first amendment as interpreted by (other) Supreme Court precedent. Moreover, plaintiffs attack the state's rationale for the contribution limits at issue by claiming that: 1) the state's espoused anti-corruption interest has no force in the context of contributions by political parties; and 2) the contribution caps on political parties do not promote the state's anti-evasion rationale because they do not prevent evasion of the individual contribution limits.

When the motion for preliminary injunction first came before this Court in January of 1999, there were no

valid limits under Missouri law on the amount of money that an individual could contribute to a candidate for state office. *See Shrink II*, 161 F.3d at 522. The Court therefore issued the injunction in large part because "one of the purported objectives of the contribution limits at issue here (i.e., thwarting a person from evading the limit on the amount that he or she can legitimately give to a given candidate) has ceased to have any force whatsoever." *Lamb*, 31 F. Supp. 2d at 1164. Obviously, this statement is no longer true in light of *Nixon*.[2] However, this fact does not compel the Court to vacate the preliminary injunction.

While the probability that the movant will succeed on the merits is generally regarded as the most important factor of the *Dataphase* test, "[t]he very nature of the inquiry on petition for preliminary relief militates against a wooden application of the probability test." *Dataphase*, 640 F.2d at 113. As the Eighth Circuit observed:

> The likelihood that plaintiff ultimately will prevail is meaningless in isolation. In every case, it must be examined in the context of the relative injuries to the parties and the public. If the chance of irreparable injury to the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party faces

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[2] After remand from the Supreme Court in *Nixon*, the Eighth Circuit concluded that "the State has adequately justified the contribution limits in their entirety" and therefore vacated its prior order enjoining enforcement of § 130.032.1 in all respects. *Shrink Missouri Government PAC v. Adams*, 2000 WL 228251 (8th Cir. Feb. 29, 2000).

> a heavy burden of demonstrating that he is likely to prevail on the merits. Conversely, where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing on the merits can be less.

Id. It is against this backdrop that the Court must evaluate the likelihood of plaintiffs' success on the merits.

There are few legal issues more complex than those posed by this case. The Supreme Court's jurisprudence in the area of campaign finance reform is equivocal at best. In some respects the Court's opinion in *Nixon* may have raised more questions than it answered. In upholding Missouri's individual contribution limits, the Supreme Court adopted the analytical framework first set out in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and held that state contribution limits "could survive if the [g]overnment demonstrated that contribution regulation was closely drawn to match a sufficiently important interest, though the dollar amount of the limit need not be fine tuned." *Nixon*, 120 S. Ct. at 904. Rather than setting a specific dollar amount as the minimum constitutional threshold for individual contribution limits, the Supreme Court defined the relevant test as "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id.* at 909.

In support of its holding, the Court reaffirmed the distinction between contributions and expenditures for purposes of evaluating the constitutionality of campaign finance legislation. *Id.* at 903-905. The Court accepted the state's espoused interests in defending the legislation (the

prevention of corruption and the appearance of corruption) without the rigorous evidentiary showing required by the Eighth Circuit in *Shrink II*. *Id.* at 905-908. Instead, the Court relied in part upon the evidence presented in *Buckley* to demonstrate that the state's anti-corruption rationale was sufficiently supported to justify Missouri's contribution limitations on individuals. *Id.*

Importantly, however, *Nixon*, does not address contribution limitations on political parties. The Court's reasoning, which reaffirms the legitimacy of the state's anti-corruption rationale, is less persuasive when applied to contributions by political parties. In contrast, several Justices directly addressed this issue in *Colorado Republican Federal Campaign Committee v. Federal Election Com'n*, 518 U.S. 604 (1996) (plurality), and concluded that contribution limitations on political parties in federal elections violate the First Amendment. See *id.* at 626.[3] Those opinions, of

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[3] In *Colorado Republican*, the Supreme Court held that limits on independent expenditures by political parties in federal elections violate the First Amendment. 518 U.S. at 604. Seven members of the Court supported the Court's judgment that limits on a political party's independent expenditures (i.e., expenditures made by a political party that are not coordinated with a candidate) violate the First Amendment. Justice Breyer announced the judgment of the Court and delivered an opinion, joined by Justices O'Connor and Souter, finding that limits on independent expenditures violate the First Amendment. However, four other members of the Court -- Chief Justice Rehnquist and Justices Kennedy, Scalia and Thomas -- would have also held that limits on both independent and coordinated expenditures (which are considered contributions pursuant to § 441a (a) (7) (B) (I) of the Federal Election Campaign Act) violate the First Amendment. *Id.* at 626.

course, do not provide definitive legal support for plaintiffs' position because they are partial dissenting opinions only.[4]

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[4] Justices Kennedy and Thomas authored opinions concurring in the judgment and dissenting in part. Justice Kennedy argued that the "central holding" of *Buckley* is "that spending money on one's own speech must be permitted . . . and this is what political parties do" when they make expenditures on behalf of their candidates. *Colorado Republican*, 518 U.S. at 627. For this reason, Justice Kennedy would have held that "[p]arty spending 'in cooperation, consultation, or concert with' a candidate . . . is indistinguishable in substance from expenditures by the candidate or his campaign committee," and both are protected by the First Amendment. *Id.* at 630. However, Justice Kennedy also recognized that "Congress may have authority, consistent with the First Amendment, to restrict undifferentiated political party contributions which satisfy the constitutional criteria we discussed in Buckley, but that type of regulation is not at issue here." *Id.*

Justice Thomas found that the "anti-corruption rationale" for contribution limits "loses its force" when "applied in the specific context of campaign funding by political parties" as follows:

> What could it mean for a party to "corrupt" its candidate or to exercise "coercive" influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes. . . . For instance, if the Democratic Party spends large sums of money in support of a candidate who wins, takes office, and then

In addition, a majority of the Justices believed that the issue of political party contributions was not properly before the Court.

The Court also believes that plaintiffs' attack on Missouri's anti-evasion rationale may have merit because determined contributors can easily circumvent the individual limits, even with the political party contribution limitations in place.[5]

> implements the Party's platform, that is not corruption; that is successful advocacy of ideas in the political marketplace and representative government in a party system.

Id. at 645.

[5] Plaintiffs provide the following example in their brief opposing the motion to vacate:

> [A]n individual, for example, who wanted to contribute $54,825 to a statewide candidate of a political party could make a direct contribution of $1075 to the candidate and write five checks in the amount of $10,750 payable to five different "political party committees" - the party's state committee, one of its congressional district committees, one of its state senatorial district committees, one of its state representative district committees, and one of its county committees. Although the contributor could not require any one of these five committees to make a contribution to a particular candidate, each committee could

The Court recognizes that the *Nixon* Court rejected *Colorado Republican* as inapposite on contribution limits because "the issue in question was limits on independent expenditures by political parties, which the principal opinion expressly distinguished from contribution limits." 120 S. Ct. at 907. However, the Court reads this statement as an attempt to distinguish generally between expenditures and contributions, not as an attempt to distinguish between contributions by political parties and individuals.[6]

Thus, the Court is left with uncertainty as to the proper legal standard that should apply in this case. However, plaintiffs have presented the Court with substantial

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> contribute up to $10,750 to the candidate who inspired the contribution. At bottom, given a multitude of political party committees, limits on contributions made by a political party committee to its candidate do not prevent evasion of limits on individual contributions to candidates; only limits on contributions to a political party committee could, if constitutionally valid, work to achieve this end.

(Pls.' Mem. Opp. at p. 8-9, n.3) (internal emphasis omitted).

[6] Moreover, the district court upon remand in *Colorado Republican* found that limitations on coordinated expenditures by political parties (which are treated as contributions under the Federal Election Campaign Act) also violate the First Amendment. *See Federal Election Com'n v. Colorado Republican Federal Campaign Committee*, 41 F. Supp. 2d 1197, 1213 (D. Col. 1999).

authority that appears to support their position. Although in a different case the Court might require of the movant a stronger showing of the probability of success on the merits, in this case the Court finds that plaintiffs have met their burden of raising "questions so serious and difficult as to call for more deliberate investigation." *Dataphase*, 640 F.2d at 113. When considered in conjunction with the potential harms faced by plaintiffs if the injunction were vacated, the Court believes that the first factor of the *Dataphase* test weighs in favor of continuing the preliminary injunction.

B. Remaining Dataphase Factors

In its Order dated January 13, 1999, the Court found that the remaining *Dataphase* factors also weighed in favor of granting the preliminary injunction. *See Lamb*, 31 F. Supp. 2d at 1164. In particular, the Court held:

> Because enforcement of § 130.032.4's limits impairs plaintiffs' ability to promulgate and advance their political beliefs and ideas, plaintiffs face the threat of irreparable harm if an injunction is not granted. The Court also agrees with plaintiffs that the balance between that harm and the injury that granting the injunction may cause defendants and other interested parties tips decidedly towards plaintiffs. Lastly, the Court finds that as plaintiffs' motion appears to have a sound constitutional underpinning, issuing the injunction is in the public interest.

Id. Plaintiffs contend that the analysis of these remaining *Dataphase* factors has not changed since that time and still requires the issuance of the preliminary injunction.

In addition, plaintiffs contend that they will suffer the following irreparable harm if the preliminary injunction were vacated: 1) the Missouri Republican Party's candidate recruiting efforts will be hampered because it will be unable to contribute promised "seed money" to prospective candidates in excess of the statutory limits; 2) the Missouri Republican Party's ability to support its candidates through the use of in-kind contributions could be diminished; and 3) plaintiffs could face significant penalties for making and accepting contributions in excess of the statutory minimum.

For their part, defendants contend that they will suffer irreparable harm if the preliminary injunction is not vacated. Defendants claim that, with the reinstatement of the individual contribution limits through *Nixon*, "the state and the public now face a risk that the Court found not to be present when it issued the preliminary injunction in this case, namely that individuals will try to evade the limits by funneling money to candidates through party committees." (Defs.' Reply at 12). Defendants also maintain that the compelling public interest in preventing corruption, the appearance of corruption and the evasion of individual limits through the use of contribution limits outweighs any potential harm to plaintiffs if the injunction were vacated.

Defendants also argue that plaintiffs' claims of irreparable harm are specious. Defendants contend that plaintiffs have failed to identify a specific candidate to whom they intend to make a contribution in excess of the statutory limits, and that plaintiffs' claim of stifling recruitment activities "has been invented for purposes of this case."[7]

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[7] The amended version of Exhibit B to defendants' reply in support of vacating the preliminary injunction demonstrates that defendants have grossly overstated their argument on this

(Defs.' Reply at 13). Defendants also maintain that plaintiffs' concerns about in-kind contributions are a red herring because plaintiffs have not challenged the classification of in-kind contributions. As for plaintiffs' concerns about potential penalties for failure to comply with the statutory limits, defendants contend that "those matters are either water under the bridge or potential harms that can be adequately addressed in consideration on the merits." (Defs.' Reply at 15).

The Court believes that the balance of harms tips decidedly in favor of plaintiffs. The Court still believes that plaintiffs face irreparable harm if their ability to promulgate and advance their political ideas, especially by supporting candidates with "seed money," is hampered or potentially extinguished before this case is decided on the merits. Missouri is now in the early stages of an election year. Filing began on February 29, 2000. John Hancock, executive director of the Missouri Republican Party, avers that plaintiffs "are now in one of the busiest times in the election cycle because we are in the midst of party building and candidate recruitment and commitment." (Hancock Aff. at ¶ 2).

During election years, the Missouri Republican Party directs its recruitment efforts toward candidates running for introductory levels in state government. (Hancock Aff. at ¶ 3). For these candidates without the personal means to finance their campaigns, the Missouri Republican Party is their only source for "seed money." (Hancock Aff. at ¶ 4). The Missouri Republican Party has already promised to fund the start-up costs for several of these candidates, which could easily exceed the statutory limits. The potentially devastating

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point.

impact upon plaintiffs' recruitment efforts if the preliminary injunction were vacated is summarized by Hancock as follows:

> Stated plainly, the failure to adequately support potential candidates early equals failure to recruit. Failure to recruit equals failure to run candidates for some offices. Failure to present Republican candidates to the voters equals failure to do our job. Finally, failure to do our job equals diminished public choice in elections. Thus, [contribution] limits equal irreparable harm to the party and the public.

(Hancock Aff. at ¶ 8). The Court agrees.

Even more troublesome to the Court is the threat of irreparable harm to plaintiffs in the form of substantial penalties for failure to comply with the statute. In their motion to vacate, defendants contend that, with respect to contributions made before the Court enjoined enforcement of the law, they took no action to impose liability for the surcharge contemplated by § 130.032.7 other than to send the required notices for the return of non-allowable contributions. Defendants are noticeably silent, however, about the effect, if any, that vacating the preliminary injunction now will have on those contributions and the contributions made during the time period that the injunction was in effect. Although defendants argue that collection of surcharges is not imminent because the state would first have to file a collection action to collect the surcharges, they make no representations to the Court that the state will forego any collection or other actions pending resolution of this action. Instead, they simply assert that plaintiffs are not facing

potential harm because they could seek a stay of any collection action during the pendency of this case. The Court does not believe that this potential remedy diminishes the possibility that plaintiffs could be irreparably harmed if the preliminary injunction were vacated.

Defendants are correct that they are now facing a potential harm -- evasion of the individual contribution limits -- that was not present when the Court issued the injunction on January 13, 1999. The Court has doubts, however, about the immediacy and severity of this potential harm. Defendants have presented the Court with no evidence about the logistics of enforcing the individual limits after *Nixon*. The Court is unwilling to speculate as to the timing and implementation of the individual limits, and without this evidence the Court cannot conclude that any potential harm to defendants is sufficiently imminent so as to warrant vacating the preliminary injunction.

Moreover, as discussed above, even if the preliminary injunction were vacated, contributors could still evade the individual limits. Thus, the Court does not believe that any potential injury to defendants is so serious as to outweigh the potential harm to plaintiffs if the injunction were vacated.

In sum, the Court believes that the balance of harms in this case favors preservation of the status quo pending a ruling on the merits of this case. Given the importance of the issues presented, the Court believes that expedited treatment of this case is warranted. Accordingly, after reviewing the joint proposed scheduling plan filed by the parties on February 8, 2000,

IT IS HEREBY ORDERED that the following schedule shall apply in this case, and will be modified only upon a showing of exceptional circumstances:

I. SCHEDULING PLAN

[Omitted]

II. ORDER RELATING TO TRIAL

This action is set for a NON-JURY trial on July 5, 2000, at 9:00 a.m. This is a two week docket.

[Trial Deadlines Omitted]

IT IS FURTHER ORDERED that defendants' motion to vacate the preliminary injunction dated January 19, 1999 [#37] is denied.

/s/
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 13th day of March, 2000.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 00-1773

Missouri Republican Party, A Political Party Committee; Pierce for Auditor, A Candidate Committee; Charles A. Pierce; Marc Ellinger; Citizens for Eric Zahnd, A Candidate Committee; Eric Zahnd; Lee R. Keith; Citizens to Elect Mike Reid, A Candidate Committee; Michael J. Reid; Elaine Tschee Reid,

Appellees,

v.

Charles G. Lamb, In his official capacity as Executive Director of the Missouri Ethics Commission; Robert Gardner, In his official capacity as Chair of the Missouri Ethics Commission; Patricia Flood, In her official capacity as Vice-Chair of the Missouri Ethics Commission; Richard Adams, In his official capacity as a Member of the Missouri Ethics Commission; Elaine Spielbusch, In her official capacity as a Member of the Missouri Ethics Commission; Donald Gann, In his official capacity as a Member of the Missouri Ethics Commission; Mike Greenwell, In his official capacity as a Member of the Missouri Ethics Commission; Jeremiah W. (Jay) Nixon, In his official capacity as Missouri Attorney General,

Appellants.

Filed: April 5, 2000

Before ROSS, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

ORDER

The State's motion to expedite the appeal from the order of the District Court granting a preliminary injunction is denied.

Inasmuch as the District Court has expedited the setting of the case for trial, ordering a trial date of July 5, 2000, and an appeal from that court's final order is anticipated, the Clerk is directed to hold the briefing schedule for the present appeal in abeyance. A motion to expedite any appeal that may be taken from the final order of the District Court will have an informal presumption in its favor.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Supreme Court, U.S.
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(2)

No. 00-1136

IN THE

Supreme Court of the United States

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,

Petitioners,

v.

MISSOURI REPUBLICAN PARTY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

W. BEVIS SCHOCK
7777 Bonhomme
Suite 2300
St. Louis, MO 63105
(314) 726-6545

D. BRUCE LA PIERRE*
Washington University
School Of Law
One Brookings Drive
St. Louis, MO 63130-4899
(314) 935-6477

Attorneys for Respondents

* *Counsel of Record*

165238

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

Did Missouri carry its burden of demonstrating under *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), that limits on the amount of cash and in-kind support provided by political parties to their candidates are closely drawn to prevent corruption or the appearance of corruption?

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OPINIONS BELOW

Petitioner inadvertently failed to note this Court's order (No. 00-A241) denying Missouri's application for a stay, which is reported at 121 S. Ct. 31 (2000).

STATEMENT OF THE CASE

The Missouri Republican Party (MRP) is a political party committee organized under Missouri law. The MRP's primary goals are to take control of state government by electing Republican candidates to statewide office and to the state legislature and, in turn, to implement Republican policies and principles. The party's fate is inextricably tied to its candidates. The MRP, like other political parties, can give effect to its views "only by selecting and supporting candidates." *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 629 (1996) (Kennedy, J., Rehnquist, C.J. & Scalia, J., concurring in the judgment and dissenting in part) (*Colorado I*).

Missouri imposes "contribution" limits on the amount of cash and in-kind support that political parties can provide their candidates. These limits substantially interfere with the MRP's ability to recruit candidates, to provide seed money to its candidates, and to "target" its support on particular races critical to party's goal of taking control of state government.

The court of appeals held that these state law limits on political party "contributions" to their candidates violate the First Amendment. The Eighth Circuit expressly recognized this Court's recent determination "the 'quantum of empirical evidence needed to satisfy heightened judicial scrutiny of

legislative judgments will vary up or down with the novelty and plausibility of the justification raised.' " Pet. App. A7 (*quoting Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 906 (2000)). Here, however, the justification — "the threat that a political party will corrupt a candidate" — is "novel and not particularly plausible," and "the record is wholly devoid of any evidence that limiting parties' campaign contributions will . . . reduce corruption." *Id.* at A6, A7, A8. There is, moreover, no reason to impose limits on political parties' speech to prevent evasion of limits on individual contributions: the state "already ha[s] a mechanism in place that deals with attempts by individuals to circumvent limits on their contributions by using a political party as a mere conduit." *Id.* at A7.

1. Missouri limits, as "contributions," the amount of both cash and in-kind support provided by political parties to their candidates.[1] Although Missouri does not prevent political parties from making expenditures independently of its candidates, the slightest degree of cooperation, coordination, or consultation between a political party and its candidates

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1. The statute defines an "in-kind contribution or in-kind expenditure" as "a contribution or expenditure in a form other than money." Mo. Rev. Stat. § 130.011(19) (Supp. 1999). It limits "the amount of cash contributions, and a separate amount for the amount of in-kind contributions, made by or accepted from a political party committee" to elect an individual to: $10,000 for the offices of governor, lieutenant governor, secretary of state, state treasurer, state auditor, and attorney general; $5,000 for the office of state senator; $2,500 for the office of state representative; and "[t]o elect an individual to any other office of an electoral district, ward or unit, ten times the allowable contribution limit for the office sought." *Id.* § 130.032.4. In an unopposed primary election, the maximum "contribution" made by a political party is one-half the otherwise applicable limit. *Id.*

makes the party's support a "contribution" subject to the state law limits. *See* Missouri Ethics Commission, Opinion No. 00.05.100 (May 15, 2000) (ruling that "if a candidate participates in the selection of billboard signs or other medium to advertise a website for that candidate, and the candidate has some design, control or influence concerning the website, such billboard expenditure advertising and website expenditure would be considered a contribution from the party to the candidate").

2. In the 1998 general elections, the Missouri Republican Party made cash payments totaling $133,500 to Pierce for Auditor (a Republican candidate for statewide office), cash payments totaling $73,750 to Citizens for Eric Zâhnd (a Republican state senate candidate), and cash payments totaling $8300 to Citizens to Elect Mike Reid (a Republican state house candidate).

a. The MRP provided cash support for its three candidates because it had targeted their races — that is — the party believed that the election of Pierce, Zahnd, and Reid was critical to the party's goal of taking control of the executive and legislative branches of government. If, for example, Zahnd and one more targeted Republican state senate candidate had both won their races, then the MRP would have gained control of the state senate for the first time in the last half of the twentieth century.

b. The party believed that these payments to its candidates were legal and reported them to the Missouri Ethics Commission (MEC). The MRP believed that its contributions were legal because the party limits were based on the individual contributions limits that had been enjoined on July 23, 1998 by the court of appeals. *See Shrink Missouri*

Government PAC v. Adams, 151 F.3d 763 (8th Cir. 1998). The MEC increased the individual contribution limits in the 1998 election cycle from $1000 to $1075, from $500 to $525, and from $250 to $275.[2] The MEC published these new inflation-adjusted limits on individual contributions, but it never published inflation-adjusted limits on political party contributions. Instead, during the 1998 election cycle, the MEC told the MRP that the "party limits are ten times the individual limits."

c. Given the court of appeals' July 23, 1998 order enjoining enforcement of the individual limits, the MRP had a good faith, reasonable belief that there no limits on party contributions — that is — the party limits were "equal to zero multiplied by ten, or zero."[3] Although there were many ways — other than direct contributions to party candidates

2. State law provides that in each even-numbered year "contribution" limits "shall be increased" to take inflation into account and "rounded to the nearest twenty-five-dollar amount." Mo. Rev. Stat. § 130.032.2 (Supp. 1999).

3. As the district court subsequently held, the party limits served no purpose after the limits on individual contributions had been enjoined. Pet. App. A55 ("one of the purported objectives" of the party limits to "thwart[] a person from evading the limit on the amount that he or she can legitimately give to a given candidate . . . ceased to have any force whatsoever" when enforcement of the individual limits was enjoined). Indeed, Missouri subsequently conceded that the state had no reason to enforce the party limits while the individual limits were enjoined in 1998: "Defendants, all state officials, consented to [district court's January 13, 1999 preliminary injunction barring enforcement of the party limits] because the limits on party committee contributions could have little effect so long as individuals and non-party committees could contribute unlimited amounts directly to candidates." Appellees' Opposition to Appellants' Motion for Injunction Pending Appeal (July 14, 2000) at 2.

— that Missouri Republicans could have supported the Pierce, Zahnd, and Reid campaigns without raising any risk of legal action by Missouri, the MRP, acting in reliance on the MEC's statements, provided support directly and openly to its candidates.

3. After the MRP and its candidates reported the contributions at issue, the MEC determined that state law (Mo. Rev. Stat. § 130.032.4) prohibited the party from making cash payments in the general election of more than $10,750 to its statewide candidate, of more than $5375 to its state senate candidate, and of more than $2700 to its state house candidate. The MEC initiated enforcement proceedings, and it is now seeking penalties under Mo. Rev. Stat. § 130.032.7 in the amount of $201,725 from the MRP, $126,750 from Pierce, $68,375 from Zahnd, and $6,600 from Reid.

4. The Missouri Republican Party and its three candidates filed a complaint on November 16, 1998 and set up two separate civil rights violations.

a. First, they alleged that Mo. Rev. Stat. § 130.032.4, which restricts the amount of financial support provided by a political party to its candidates, violated their First Amendment rights of political speech and association.

b. Second, they alleged that enforcement of the party limits, which Missouri had calculated on the basis of individual contribution limits then enjoined under the July 23, 1998 Order of the court of appeals, *see Shrink Missouri Government PAC v. Adams*, 151 F.3d 763 (8th Cir. 1998), deprived them of their First and Fourteenth Amendment rights and of their liberty and property without due process of law in violation of the Fourteenth Amendment.

5. On January 13, 1999, the district court, the Honorable Catherine D. Perry, entered an order enjoining enforcement of the party contribution limits. Pet. App. A49. On March 1, 1999, Judge Perry entered another order staying the proceeding until the Court's decision in *Nixon v. Shrink Missouri Government PAC*.

6. The Court decided *Nixon* on January 24, 2000, *see* 120 S. Ct. 897 (2000), and upheld Missouri's $1075 limit on contributions by individuals and political action committees (PACs) to candidates.

7. On March 13, 2000, the district court denied Missouri's motion to vacate the preliminary injunction and set the case "for expedited briefing and a hearing on the merits." Pet. App. A58; *id.* at A59. The case, however, did not go to trial. On June 22, 2000, just as all pretrial matters were being completed and just two weeks before the trial set for July 5th, the district court granted Missouri's summary judgment motion. Pet. App. A19-A43.

8. The district court held that Missouri's limits on political party "contributions" were constitutionally valid under *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000). Pet. App. A19.

a. The district court found that there were no factual issues precluding summary judgment and that the party's cash support for its candidates should be labeled a "contribution" as a matter of law.[4] Pet. App. A22.

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4. Although Missouri limits the amount of both cash and in-kind contributions (*see* note 1 *supra*), the district court did not consider the limits on in-kind contributions. Pet. App. A23-A25.

b. It held that "contribution limits on political parties are evaluated under the same standards applied to contribution limits on individuals." Pet. App. A31.

c. Under *Nixon*, "Missouri's campaign contribution limits on political parties do not violate the First Amendment" because they are not " 'so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless.' " *Id.* at A38-A39 (*quoting Nixon*, 120 S. Ct. at 909).

d. Judge Perry recognized, nonetheless, that if she were "writing . . . on a blank slate," she "might well" have held "that political parties should be exempted from the legal standards governing other kinds of campaign contributors." Pet. App. A41.

e. The district court did not address the MRP's claim that it had relied on the MEC's interpretation of the statute and that subsequent enforcement of the party limits deprived the party of its liberty and property without due process of law.

9. The court of appeals reversed the district court's judgment and ordered the lower court to enter an injunction barring enforcement of party contribution limits. Pet. App. A8; *see id.* at A1-A16. Judge Morris S. Arnold, joined by Judge Pasco M. Bowman, held that the Missouri statutes limiting the amount of both cash and in-kind "contributions" made by political parties to their candidates violate the First Amendment on their face. *Id.* A1-A8. Judge John R. Gibson concurred in part and dissented in part. *Id.* at A9.

a. The majority acknowledged that the line between contributions and coordinated expenditures is "particularly difficult to discern when the case involves money that passes from a party to one of its candidates." *Id.* at A3. It held, nonetheless, that the cash payments made by the MRP to three of its 1998 candidates were "contributions as a matter of law" because the candidates had physical possession of the party's funds. *See id.* (noting candidates' statements that "although they discussed the use of the money with the party before it passed to them, they were nevertheless free to spend it as they saw fit").

b. Having characterized the MRP's support as a "contribution," the court of appeals recognized that there was no ready analogy between political party contributions and the individual contributions at issue in *Buckley v. Valeo*, 424 U.S. 1 (1976) and in *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000). Pet. App. A4-A6. In *Buckley*, as the court of appeals recognized, the Court upheld limits on an individual's contributions because these limits imposed " 'only a marginal restriction upon the contributor's ability to engage in free communication.' " *Id.* at A4 (*quoting Buckley*, 424 U.S. at 20-21). In *Buckley*, the Court found that an individual's " 'contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support' " and that a limit on such contributions " 'involves little direct restraint on . . . political communication, for it permits the symbolic expression . . . evidenced by a contribution.' " *Id.* (*quoting Buckley*, 424 U.S. at 21).

c. The considerations that supported individual contribution limits in *Buckley*, however, "simply do not carry the

same force when the contributor is a political party." *Id.* As the court of appeals explained,

> The main object of a political party is to elect its candidates to office, and, in large measure, the speech of its candidates is its own speech. While political parties employ various methods to speak, a principal way in which they express themselves is through the speech of their candidates. In fact, parties and their candidates are often virtual alter egos.

Id. at A4-A5. Given "their unity of purpose, and the virtual identity of parties and their candidates,"[5] the Eighth Circuit found that "it is not easy to say, in the words of *Buckley* . . . that a political party's contribution 'does not communicate the underlying basis for the support.' " *Id.* at A5 (*quoting Buckley*, 424 U.S. at 21).

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5. The Eighth Circuit recognized that "there is [not] always an exact one-to-one correspondence between candidates and their parties." Pet. App. A5. Nonetheless, it found that:

> parties seek to field a team and support it. Candidates are frequently, moreover, and with excellent reason, called their party's standard- bearers, and they make frequent appeal to party principle; and in their interactions, candidates and parties influence each other and become more alike, so as to present a coordinated and common front. They are often, in other words, virtually indistinguishable from each other, and their identities are merged in a way that makes dealings between them more than merely transient symbiotic ones between separate and distinct entities.

Id.

Instead, "a party's contribution provides an ideological endorsement and carries a philosophical imprimatur that an individual's contribution does not, and thus it cannot properly be called a 'contribution' in the same sense that the individual contributions at stake in *Buckley* were." *Id.* Moreover, "a party's contribution to its candidate, again in the words of *Buckley* [is not] merely a 'symbolic expression' of support; it is more like a substantive political statement than others' contributions are." *Id.* (*quoting Buckley*, 424 U.S. at 21). Thus, "the first amendment rights at stake [in limits on political party contributions] are different from, and weightier than, those that were involved in *Buckley*." *Id.* at A5-A6.

d. Notwithstanding the fundamental differences between individual contributions and political party contributions, the Eighth Circuit expressly recognized this Court's determination in *Nixon* that "the 'quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.' " *Id.* at A7 (*quoting Nixon*, 120 S. Ct. at 906). Here, however, the state's justification — "the threat that a political party will corrupt a candidate" — is "novel and not particularly plausible." *Id.* at A6, A8. Missouri, moreover, had no evidence that a political party's "contributions" cause corruption or the appearance of corruption. *Id.* at A7 ("the record is wholly devoid of any evidence that limiting parties' campaign contributions will . . . reduce corruption").

e. Missouri's contention that preventing the circumvention of limits on individual contributions justifies limiting the size of a political party's contributions fared no better than its anti-corruption rationale. Pet. App. A6-A7. The court of appeals recognized that *Buckley* had upheld a $25,000 limit

on total individual contributions *to* federal candidates, national party committees and other political committees on the ground of preventing evasion of the federal $1000 limit on individual contributions to candidates. *Id.* at A6 (*citing Buckley*, 424 U.S. at 38). *Buckley*, however, does not provide any authority for limiting the size of contributions made *by* political parties to their candidates. As the Eighth Circuit explained, *Buckley* "upheld a limitation on the total amount that any one person could contribute on the ground that it would keep individuals from circumventing the limits on giving to any one candidate." Pet. App. A6 (*citing Buckley*, 424 U.S. at 38). In the case of Missouri's "contribution" limit, however, "the challenged restriction is on the party's giving, and the [government] seek[s] to justify it on the ground that it would keep individuals from doing an end run around limits on their own giving." *Id.* As the Eighth Circuit held, imposing "burdens [on] the free speech rights of political parties in order to control the activities of someone else [an individual contributor]" is "something quite different from what *Buckley* approved." *Id.* at A6-A7.

f. Even if, as Missouri suggested, some individuals attempt to circumvent limits on individual contributions to candidates by making "earmarked" contributions to political parties for particular candidates, there is no reason to limit political parties' freedom of speech. Missouri "already ha[s] a mechanism in place that deals with attempts by individuals to circumvent limits on their contributions by using a political party as a mere conduit." *Id.* at A7. As the Eighth Circuit explained, "it would be illegal under Missouri law for an individual and a political party secretly to agree that the party would pass along the individual's contribution to a candidate after that individual had already contributed the statutory maximum" and any such "earmarked" contribution would be subject to the limits on individual contributions. *Id.*

g. Judge John R. Gibson would have upheld Missouri's limits on the amount of cash and in-kind support provided by political parties to their candidates. *Id.* at A15-A16 & A16 n.2. Judge Gibson concurred in the majority's determination that the MRP's support for its candidates should be labeled "contributions." *Id.* at A9. In his view, however, "contributions made by a political party are no different than contributions made by individuals or other groups." *Id.* at A15. Judge Gibson found that Missouri had not tried to justify the party limits on the ground that a political party's contributions to its own candidates cause corruption or the appearance of corruption. *Id.* at A14 & n.1. Nonetheless, he would have upheld the limits on political parties as a means of preventing evasion of individual contribution limits. *Id.* at A14-A16.

10. The court of appeals denied Missouri's motion for a stay (Pet. App. A17), and this Court denied Missouri's application for a stay. *Nixon v. Missouri Republican Party*, 121 S. Ct. 31 (2000) (No. 00-A241).

REASONS FOR DENYING THE WRIT

Petitioners have not presented any question that warrants this Court's review. The Court's decision in *FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221 (10th Cir.), *cert. granted*, 121 S. Ct. 296 (2000) (No. 00-191) (*Colorado II*), is not likely to create any reason to question the Eighth Circuit's application of *Nixon* to limits on the amount of financial support provided by Missouri political parties to their candidates.

1. The case does not present any significant question whether the court of appeals correctly applied *Nixon*. The Eighth

Circuit recognized that *Nixon* upheld limits on campaign contributions by individuals and PACs and that this case involved limits on political party contributions. Pet. App. A3-A6. The court of appeals, nonetheless, followed this Court's direction in *Nixon* that the " 'quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.' " *Id.* at A7 (*quoting Nixon*, 120 S. Ct. at 906)). Applying this standard, the court of appeals found that the state's justification — "the threat that a political party will corrupt a candidate" — is "novel and not particularly plausible" and that "the record is wholly devoid of any evidence that limiting parties' campaign contributions will . . . reduce corruption." *Id.* at A6, A7, A8.

Missouri did not make any showing that the support provided by political parties to their candidates causes corruption or even an appearance of corruption. The Court, of course, has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon*, 120 S. Ct. at 907; *see City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1403 (2000) (Souter, J., concurring in part and dissenting in part) (same); *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1891 (2000) (when government regulates speech to protect children from exposure to indecent materials it "must present more than anecdote and supposition"). Thus, the court of appeals held correctly under *Nixon* that the state had not carried its burden of justifying limits on party contributions.[6]

6. Neither *Nixon* nor *Buckley* excuses Missouri from its burden of making some showing that a political party's support for its candidates causes corruption or the appearance of corruption. (Cont'd)

2. Missouri's suggestions of conflict are strained. Pet. 20, 21-23. Although one lower federal court upheld Colorado's $10,000 to $400,000 limits on political parties' "contributions" to their candidates, the Colorado legislature repealed these limits, and the Tenth Circuit vacated the district court's judgment. *Citizens for Responsible Government State Political Action Committee v. Buckley*, 60 F. Supp. 2d 1066, 1093-97 (D. Colo. 1999), *vacated in pertinent part*, 2000 WL 1902427 *2, *21 (10th Cir. 2000); 2000 Colo. Legis. Serv. Ch. 36, § 12 (H.B. 1194, Mar. 15, 2000) (West). Similarly, although another lower federal court approved limits on party contributions to candidates in principle, it held that the particular $200, $300, and $400 limits were "too low to pass constitutional muster." *Landell v. Sorrell*, 118 F. Supp. 2d 459, 484-87 (D. Vt. 2000). One state court has considered limits on political party contributions. The Alaska Supreme Court upheld $5000 to $100,000 limits on political party "contributions" to candidates, but it did so in a very cursory fashion. *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 625-26 (1999), *cert. denied*, 120 S. Ct. 1156 (2000).

(Cont'd)

In *Nixon*, the Court permitted the state to rely on *Buckley* for the proposition that a $1000 contribution made by an individual to a candidate may cause corruption or the appearance of corruption, and it excused the state from making any additional evidentiary showing. 120 S. Ct. at 906-08. *Buckley*, however, did not address any question about the validity of limits on the financial support provided by a political party to its candidates. 424 U.S. at 58 n.66. Thus, *Nixon's* rejection of the state's duty to prove beyond *Buckley* that individual contributions cause corruption or the appearance of corruption simply does not address the separate, distinct question in this case: whether the financial support provided by Missouri political parties to their candidates causes either corruption or the appearance of corruption.

3. Missouri's assertions about the effects of the court of appeals' judgment are mistaken.

a. The state asserts that the court of appeals judgment "eliminates Missouri's ability to restrict the flow of large sums of money to candidates through party committees." Pet. 20. This assertion, however, completely ignores the court of appeals' finding that Missouri "ha[s] a mechanism in place that deals with attempts by individuals to circumvent limits on their contributions by using a political party as a mere conduit." Pet. App. A7. Missouri conceded, as the court of appeals held, that "it would be illegal under Missouri law for an individual and a political party secretly to agree that the party would pass along the individual's contribution to a candidate after that individual had already contributed the statutory maximum." *Id.* Even if, as Missouri suggests, party spending increased from 1997-98 to 1999-2000 because individuals channeled contributions through political parties (Pet. 20),[7] the state has a simple solution: enforce the limits on individual contributions with civil and criminal enforcement actions. Mo. Rev. Stat. §§ 130.032.7 (Supp. 1999), 130.081 (1994); *see* Missouri Ethics Commission, Opinion No. 00.07.101 (July 31, 2000) (holding that

7. There are, of course, many possible explanations for substantial increases in the amount of support provided by state political parties to their candidates in the 2000 elections. Missouri, for example, was widely viewed as a critical "swing" state in the 2000 Presidential elections. Missouri law does not limit contributions to state political parties, and the national parties may have provided their state counterparts with substantial funds to build support for their whole — national and state — tickets. In any event, Missouri's speculation about increases in party spending in the 2000 elections is just that: speculation. Missouri's data about political party spending through the November 2000 general elections (Pet. 20) were assembled long after the decisions of the courts below.

"candidates cannot request contributions be made to political party committees with the express purpose of passing those contributions through the committee to the candidate"). Thus, as the court of appeals recognized (Pet. App. A6-A7), there is no reason to limit the amount of support provided by political parties to their candidates as a means to control the activities of individual contributors.[8]

b. Missouri's assertions about the potential effects of the court of appeals' judgment on federal campaign finance regulation are also mistaken. Pet. 21, 24. The Missouri and the federal regulatory schemes are fundamentally different. Missouri, for example, does not prohibit either corporate or union contributions to candidates,[9] and it does not impose any limits

8. The Court has recognized that certain contribution limits work to protect the integrity of other contribution limits. In *Buckley*, for example, the Court upheld a $25,000 limit on total individual contributions *to* federal candidates, national party committees and other political committees on the ground of preventing evasion of the federal $1000 limit on individual contributions to candidates. *Buckley*, 424 U.S. at 38. *Buckley*, however, does not provide any authority for limiting the size of contributions made *by* political parties to their candidates. The Court has never held, much less even suggested, that limits on the financial support provided *by* a political party to its candidates are a constitutionally valid means of preventing evasion of a limit on individual contributions. In fact, quite to the contrary, when Justice Breyer suggested the possibility of limits on contributions *to* a political party as a means of preventing evasion of individual contribution limits, he also recognized that limits on spending by a political party would impose a "markedly greater burden." *Colorado I*, 518 U.S. at 617 (Breyer, J., O'Connor, J., & Souter, J.) (internal quotation marks and citation omitted).

9. Missouri allows all "persons," including corporations and unions, subject to the limits upheld in *Nixon*, 120 S. Ct. 897, to make (Cont'd)

on the amount of money that individuals, corporations, unions, PACs or others can contribute to political parties. Federal law, however, prohibits corporations and unions from using funds in their corporate treasuries to contribute to or make expenditures in connection with advocating the election or defeat of any candidate for federal office. *See Mariani v. United States*, 212 F.3d 761, 769-770 (3d Cir.), *cert. denied*, 121 S. Ct. 564 (2000). Federal law also limits the amount of money that individuals can contribute to political parties for federal elections.[10] Given these fundamental differences between the two regulatory schemes, it simply does not follow, as Missouri would have the Court believe, that the Eighth Circuit's "holding will be binding when someone challenges the FECA limits on party contributions." Pet. 21.

4. The Court should decline Missouri's invitation to "bridge the gap" between *Nixon* and *Colorado II*. Pet. 19. In Missouri's view, this case bridges the gap between *Nixon* (limits on individual and PAC "contributions") and *Colorado II* (limits on "coordinated expenditures" made by political

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(Cont'd)
campaign contributions to candidates. *See* Mo. Rev. Stat. § 130.032.1 (Supp. 1999) (limiting campaign contributions by "persons" other than the candidate); *see id.* § 130.011(22) (defining the term "person" to include corporations and unions).

10. Although corporations and unions cannot make so-called "hard money" contributions to political parties for use on behalf of federal candidates, they can make unlimited "soft money" contributions to political parties for other purposes such as issue advocacy. *See Mariani*, 212 F.3d at 767-68. Since Missouri does not impose any limits on the amount of money that corporations or unions can contribute to political parties for any purpose, the federal distinction between "hard money" and "soft money" has no office in Missouri campaign finance law.

parties) because it addresses limits on "contributions" made by political parties to their candidates. *Id.* The gap — constructed out of the state's labels — is more apparent than real. In the context of the support provided by political parties to their candidates, there are no real differences between party "contributions" and party "expenditures." Even assuming that this distinction could be drawn, there is a substantial question in this case whether the court of appeals properly labeled the support provided by the MRP to its candidates "contributions" instead of "expenditures."

a. There is no difference — much less a constitutionally significant difference — between cash "contributions" made by a political party in cooperation with its candidates and cash "expenditures" made by a political party in cooperation with its candidates.[11] The MRP, for example, could make a payment of $133,500 to its candidate for state auditor to purchase television time for a specific advertisement as discussed by the party with its candidate, or the party could make a direct payment of the same sum to television stations to purchase television time for the same advertisement. The first alternative — the MRP's "donation" or payment to

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11. The Federal Election Campaign Act confirms the fundamental point that political party expenditures and contributions are indistinguishable. As Justice Breyer noted in *Colorado I*, federal law treats contributions as the equivalent of expenditures: the FECA regulates political party *expenditures* in support of its candidates as an exception to otherwise applicable *contribution* limits. *See* 518 U.S. at 610-12 (Opinion of Breyer, J., O'Connor, J., & Souter, J.). Thus, in *Colorado II*, the court of appeals measured federal limits on a political party's "coordinated expenditures" by the *Nixon* standard of scrutiny of "contribution" limits because the "FECA treats coordinated expenditures as 'contributions.' " 213 F.3d at 1226-27 (citation omitted).

its candidate — could easily be labeled a "contribution", and the second alternative — the party's "direct payment" of its candidate's media bills — could easily be labeled an "expenditure." Any distinction, however, between (1) passing the party's funds through a candidate's campaign committee to purchase television time and (2) purchasing television time directly for the same advertisement elevates form over substance.

b. Even if a political party's support for its candidates can be divided into "contributions" and "expenditures," there is a substantial question whether the court of appeals correctly found that "there was no genuine factual dispute about the nature of the monetary expenditures involved." Pet. App. A3. The Eighth Circuit held that cash payments made by the MRP to three of its 1998 candidates were "contributions as a matter of law" because the candidates had physical possession of the party's funds. *Id.* The Court relied on the candidates' statements that "although they discussed the use of the money with the party before it passed to them, they were nevertheless free to spend it as they saw fit." *Id.*

There is, however, no real difference between a "contribution" of party funds to a candidate to purchase campaign goods and services and a direct party "expenditure" to purchase the same goods and services for the candidate. The MRP makes cash payments to its candidates for specific purposes determined by the party in consultation and cooperation with its candidates and their committees. Although candidates theoretically can spend the party's funds as they "see fit" because their committees have physical custody of the party's funds, the MRP has no need to make a contract with its candidates in order to ensure that the party's funds are spent as discussed and to achieve the party's goal of taking control of state government. The MRP, in

short, can trust its candidates to use the party's funds as the candidate and the party have discussed.

5. If the Court grants the petition, the issues before the Court would include an important due process issue as well as First Amendment issues. Missouri states that "[t]he party limits were not challenged in *Shrink Missouri*, and thus their enforcement was not subject to the injunction in that case." Pet. 16, n.4. This statement, albeit technically correct, does not address the MRP's claim that the Missouri Ethics Commission (MEC) misled the MRP into believing that there were no enforceable limits on party contributions. As required by Rule 15.2 of the Rules of this Court, respondents note that Missouri's statement should not be read to preclude the MRP from raising the issue, apart from the validity of the party limits under the First Amendment, that the MEC violated the party's due process rights to fair warning and notice and to rely on the MEC's interpretation of the statute.[12] *See, e.g., United States v. Pennsylvania Industrial Chemical Corporation*, 411 U.S. 655, 674 (1973) (rightful reliance on agency interpretation even though conduct violated letter of the law).

6. The Court should deny the petition in order to avoid a substantial risk of unnecessarily deciding constitutional

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12. The MRP's reasonable, good faith belief, in reliance on the MEC's statements, that the party limits were not enforceable is borne out by the fact that the Missouri Democratic Party (MDP) also made contributions in excess of the party limits. *See* Response To Missouri's Application For Stay Pending Petition For Writ Of Certiorari (No. 00-A241) (Exh. #1, Affidavit of John Hancock, at 18-19) (stating that the MDP made contributions in excess of the party limits in the 1998 elections and that the MEC had not pursued violations of the party limits by the MDP).

issues. The court of appeals' decision reversing the district court's order granting the state's motion for summary judgment was in effect a summary judgment for MRP. *See Fabric v. Provident Life & Acc. Ins. Co.*, 115 F.3d 908, 914-15 (11th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998) (recognizing that the power of a court of appeals to direct entry of summary judgment for a non-moving party is well-settled). In this posture, there are many unresolved issues that, notwithstanding review by this Court, would control the ultimate outcome.

a. For example, given the court of appeals' holding that both cash and in-kind party contribution limits violate the First Amendment "on their face," Pet. App. A8, it did not have any occasion to consider whether the district court had erred in applying *Nixon* to assess the effects of the party limits on *candidates* instead of assessing the effects of the party limits on political parties.

b. Similarly, the court of appeals did not have any occasion to determine whether the state had carried its burden of demonstrating that there were no genuine issues of material fact that the party limits (1) reduce the number of candidates in primary elections and reduce spending in primary and general elections, (2) interfere with the MRP's ability to use primaries to field its best candidates, (3) prevent the MRP from providing seed money necessary to recruit candidates, (4) force the MRP to support its candidates by independent expenditures that are not as effective as coordinated expenditures, and (5) have a systemwide effect of suppressing political advocacy under *Nixon* because the goals of the MRP are systemwide — to take control of state government and to implement the party's policies on a statewide basis.

7. Finally, the Court's decision in *Colorado II* is not, contrary to Missouri's suggestions, likely to create any reason either to remand this case to the Eighth Circuit or to review another party finance case. Pet. 24-25. Although it is common ground for both the Tenth Circuit and the Eighth Circuit that there is no direct analogy between individual campaign contributions and a political party's contributions to its candidates, the Eighth Circuit's judgment rests on a simple, straightforward finding under *Nixon* that "the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented." Pet. App. A7.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

W. BEVIS SCHOCK
7777 Bonhomme
Suite 2300
St. Louis, MO 63105
(314) 726-6545

D. BRUCE LA PIERRE*
Washington University
School Of Law
One Brookings Drive
St. Louis, MO 63130-4899
(314) 935-6477

Attorneys for Respondents

* *Counsel of Record*

(3)

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In the
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JEREMIAH W. (JAY) NIXON, *et al.*,
Petitioners,

v.

MISSOURI REPUBLICAN PARTY, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JAMES R. LAYTON
State Solicitor
Counsel of Record

PAUL R. MAGUFFEE
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

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1. Respondents make the same attack here that their counsel took in opposing the State of Missouri's petition for writ of certiorari in *Nixon v. Shrink Missouri Government PAC*, 120. S.Ct. 897 (2000): to allege an absence of proof and suggest that the real issue is one of the adequacy of the factual record, rather than an issue of law. That attack ignores what happened below. Petitioners "moved for summary judgment, contending that the contribution limits at issue here . . . do not violate the First Amendment *as a matter of law*." Petition Appendix (Pet. App.) A-22 (emphasis added). The district court agreed,

holding that because political party committees are indistinguishable, in a constitutional sense, from ideologically-based committees, the state can rely on the holding in *Shrink Missouri*. Pet. App. A-29-38. Thus the district court never reached the point at which the state had to prove "that the support provided by political party committees" specifically, as opposed to the support provided by political committees generally, "causes corruption or even the perception of corruption." Brief in Opposition (Br. Opp.) at 13. And the court of appeals' decision leaves no room for such inquiry.

In a backhanded way, respondents suggest a rationale for the court of appeals' decision not to remand for factual development under the "correct" law. Br. Opp. at 20. They cite *Fabric v. Provident Life & Acc. Ins. Co.*, 115 F.3d 908 (11th Cir. 1997), *cert. denied* 523 U.S. 1095 (1995), for a "well-settled" rule permitting such judgments against nonmoving parties. But that claim ignores a basic premise made clear by this Court in *Fountain v. Filson*, 336 U.S. 681 (1949), on which the Eleventh Circuit relied. An appellate court cannot enter judgment against the moving party where "[t]here was no occasion in the trial court for [the moving party] to dispute facts material to" the non-moving party's claim. *Id.* at 683. Again, the argument presented in petitioners' motion for summary judgment was that this case is no different from *Shrink Missouri*. Neither the applicable rules (*see* Fed. R. Civ. P. 56; E.D. Mo. Local Rule 7-4.01(C)) nor logic suggests that respondents could, merely by claiming in opposition to petitioners' motion for summary judgment "that factual disputes regarding the nature of the party's financial support of its candidates preclude summary judgment" (Pet. App. A-22), impose on petitioners an obligation to prove in their reply a case based on a legal theory they opposed. Thus even a correct finding that the record at this stage is "wholly devoid of any evidence" (Pet. App. A7, quoted, Br. Opp. at 2, 22) would justify at most a remand, for

petitioners were entitled to an "opportunity to remedy the defect which the appellate court discovered in this case" (*Fountain*, 366 U.S. at 683).

But again, the court of appeals did not really leave room for factual inquiry. It accepted respondents' proposition that "there is no direct analogy between individual campaign contributions and a political party's contributions to candidates" (Br. Opp. at 22) as a matter of law. It denied the district court the opportunity to receive and consider in the first instance proof regarding political party committees and corruption as another district court once did in *Buckley v. Valeo*, 424 U.S. 1 (1976). In effect, the court of appeals declared that the State can never, as a matter of law, succeed on remand. That dramatic declaration merits this Court's review.

2. Respondents quote the court of appeals' characterization of petitioners' claim as merely a "threat that a political party will corrupt a candidate." Br. Opp. at 13. But that is a crabbed view. Petitioners have always said that large sums flowing to a committee and then on to a candidate carry the appearance of corruption because of their source and destination, not because of the identity of the intermediary. But again, the court of appeals did not wait for proof; instead it held that as a matter of constitutional law, the perception created by the flow of money through party committees is so different from the perception created by the flow of money though the Shrink Missouri Government PAC that the former merits treatment entirely different from that given to the latter in *Shrink Missouri* and *Buckley*. The Eighth Circuit then left the question of what proof is acceptable as unclear as it did when it decided *Shrink Missouri* and its predecessors. If the Eighth Circuit was right in differentiating this case from *Buckley* and *Shrink Missouri*, the states – and the federal government – need some guidance on meeting that evidentiary challenge. Such

guidance will not come in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, No. 00-191 (*Colorado Republican II*), unless the Court there entirely eliminates, for party committees, the line between contributions and expenditures, as respondents urge (*see* Br. Opp. at 18).

3. Respondents' reiteration of the suggestion that party contribution limits are unnecessary because other tools are available to attack evasion actually reinforces the link between this case and the sections of the Federal Election Campaign Act (FECA) upheld in *Buckley*. Federal law, too, prohibits agreements to pass funds through committees. *See* 2 U.S.C. § 441a(a)(8). But in *Buckley*, that was insufficient to defeat the antievasion rationale. *See* 424 U.S. at 38. And it was insufficient in *California Medical Association v. Federal Election Comm'n*, where this Court rejected the notion that the presence of anti-fraud provisions in the FECA rendered the antievasion rationale unavailable to uphold a cap on contributions to candidates by multicandidate committees. 453 U.S. 182, 200, n. 20 (plurality), 204 (Blackmun, J., concurring) (1981). That reasoning remains appropriate today – particularly where, as here, there is no showing that the alternative mechanism can reach any but the most egregious cases.

Moreover, to parse through a statute and assume (without proof) that one part of a complex regulatory scheme renders another part unnecessary and thus unconstitutional conflicts with this Court's insistence that courts not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982), *citing California Medical*, 453 U.S. at 201 (plurality).

4. Unable to deny that the court of appeals' decision contradicts those of other courts, respondents belittle the

significance of the contrary holdings. Two of their references merit note.

Respondents reiterate that the Colorado legislature enacted a new regulatory scheme, without limits on party contributions (*see* Colo. Stat. chp. 1-45 (2000)), after significant portions of its previous scheme were struck down (*see Citizens for Responsible Government v. Buckley*, 60 F.Supp.2d 1066, 1087 (D. Colo. 1999), *vacated sub nom. Citizens for Responsible Government v. Davidson*, 2000 U.S. App. LEXIS 33727 (10th Cir. 2000)). But that change merely proves the need to allow legislatures, not courts, to "fine tune" (*Buckley*, 424 U.S. at 20) campaign finance regulations. Today, the Colorado legislature can further "fine tune" its regulatory scheme by reinstating party limits. Legislatures in Missouri and other Eighth Circuit states cannot.

Respondents' pointed reference (Br. Opp. at 14) to the size of the Alaska limits is misleading. Missouri imposes limits "per election"; Alaska poses them "per year." *See* Alaska Stat. § 15.13.070(d). A "year" covers not just the primary and general elections, but even months before candidate filing, thus covering the entire period during which party contributions are likely. *See id.* §§ 15.25.040, 15.15.020.[1] And Alaska aggregates in one limit what Missouri limits separately as monetary and "in-kind" contributions. *See id.* § 15.12.400(3). The limits in the two states are really comparable – yet now, while Missouri parties can give unlimited amounts, Alaska parties cannot.

[1] The same is true of Vermont's "too low" limits, which apply to contributions made during a two-year "election cycle." Vt. Stat. Ann. tit. 17 § 1805(a).

But with regard to Alaska, perhaps most important is respondents' accusation that the court's analysis was "cursory." Br. Opp. at 14. The Alaska court could give "cursory" consideration to the factual basis for party limits because it concluded that a political party committee handing money to candidates is no different, as a matter of law, from political committees whose contributions are limited under *Buckley*. This Court's later decision in *Shrink Missouri* reinforces, rather than casts doubt upon, that conclusion. And again, that conclusion directly conflicts with the one reached by the Eighth Circuit.

5. Respondents deny any need for the Court to consider this case after *Colorado Republican II* because, they say, "[t]here is no difference . . . between 'cash' contributions made by a political party and cash 'expenditures' made by a political party in cooperation with its candidates." Br. Opp. 18. That statement highlights the independent significance of this case. *Colorado Republican II* merely addresses a point on the spectrum between pure contributions and pure expenditures. It requires the Court to consider whether that point is on the expenditure or on the contribution side of the line identified in *Buckley*. Respondents place all political party spending in support of candidates on the expenditure side of the line. That is what the court of appeals did, albeit under the guise of an evidence-based ruling, using a twisted version of the *Shrink Missouri* holding that conflicts with every other court to address the question. This Court should grant the petition and consider whether the allegedly unique nature of political party committees merits such a dramatic change in campaign finance jurisprudence.

CONCLUSION

For the reasons stated above and in the petition, the Court should grant the petition and consider the Eighth Circuit's sweeping holding.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor
Counsel of Record

PAUL R. MAGUFFEE
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

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